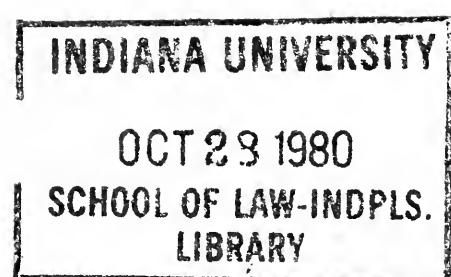


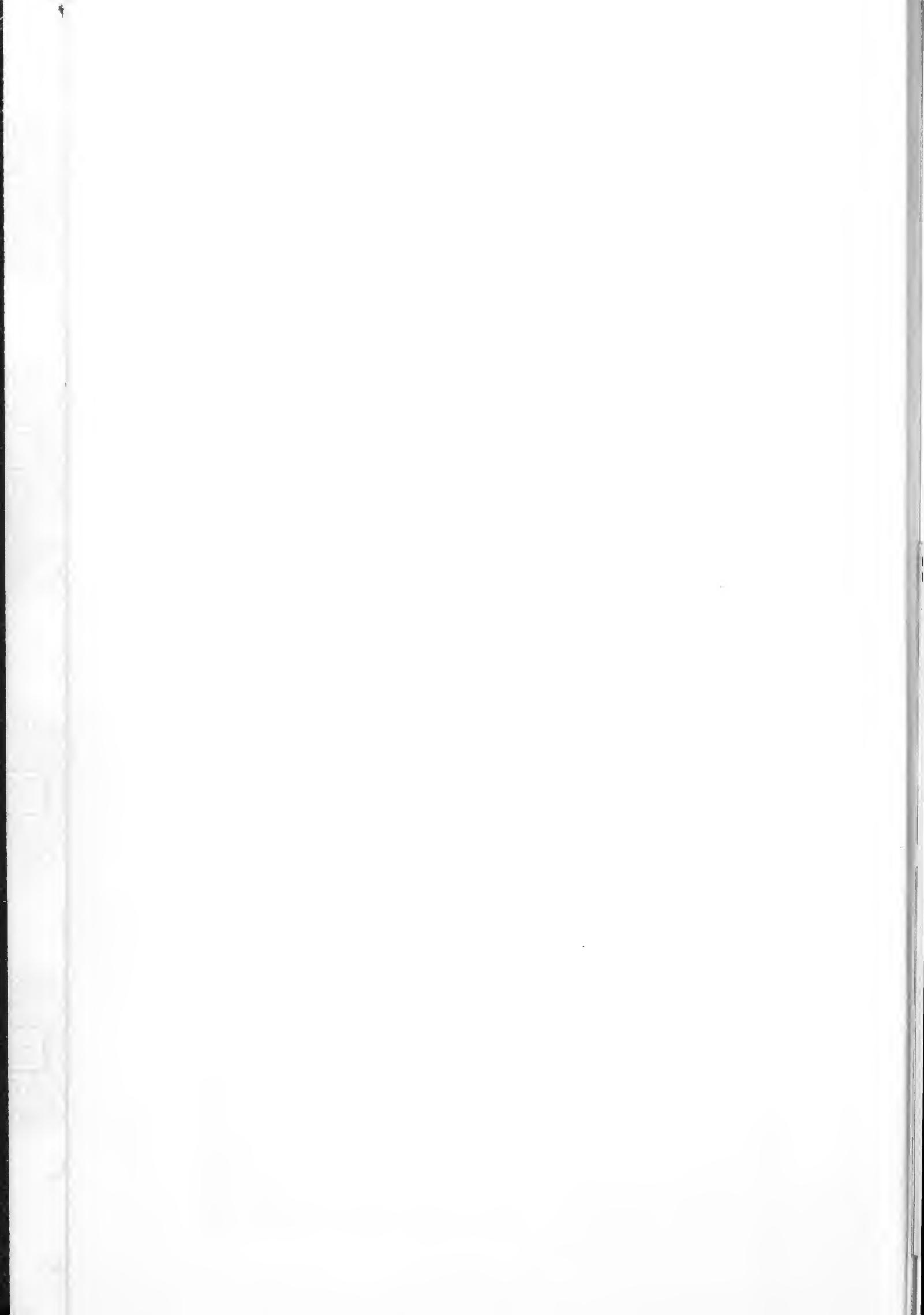


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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its sixth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1977, through May 31, 1978. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreward: Indiana's New Juvenile Code

*William A. Kerr**

On March 10, 1978, the statute enacting Indiana's new juvenile code¹ was signed by the governor although the code's effective date was deferred until October 1, 1979.² By coincidence, the last major revision and codification of the state's juvenile statutes was also signed on March 10, in 1945.³ In the intervening thirty-three years, the state's juvenile justice system underwent dramatic changes, many of which are reflected in the new code. Most of these changes occurred primarily because of the decisions of the United States Supreme Court in *Kent v. United States*⁴ and *In re Gault*.⁵

The preparation of Indiana's new code can be traced directly to these two decisions. In 1967, shortly after the *Gault* decision,⁶ the Indiana Judicial Conference was established as an organization of the

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¹Act of Mar. 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (codified at IND. CODE §§ 31-6-1-1 to 10-4 (Supp. 1978)).

²Act of Mar. 10, 1978, Pub. L. No. 136, § 59(a), 1978 Ind. Acts 1196.

³Ch. 356, 1945 Ind. Acts 1724 (codified at IND. CODE §§ 31-5-2-1 to 10-2 (1976 & Supp. 1978)) (repealed effective Oct. 1, 1979).

⁴383 U.S. 541 (1966).

⁵387 U.S. 1 (1967).

⁶*In re Gault* was decided on May 15, 1967.

state's judges with authority to promote the improvement of the state's judicial system.⁷ One of this organization's first actions was the appointment of a Committee on Juvenile Procedure consisting of seventeen judges with juvenile jurisdiction. As reported by the Indiana Judicial Study Commission in 1968, this committee "drafted a revision of Indiana Juvenile Laws that will conform with the recent Constitutional requirements of juvenile procedure as interpreted by the United States Supreme Court and the Indiana Supreme Court."⁸ Although the draft was reviewed and revised by numerous organizations and groups in the intervening years, it served as the primary basis for the juvenile code which was finally enacted ten years later.⁹

Ten chapters are included in the new code which is part of the family law title (Title 31) of the Indiana statutes. These ten chapters are concerned with general provisions (Chapter 1), jurisdiction (Chapter 2), rights and effect of adjudication (Chapter 3), proceedings governing delinquent children and children in need of services (Chapter 4), termination of parent-child relationships (Chapter 5), paternity (Chapter 6), juvenile procedure (Chapter 7), records (Chapter 8), juvenile court provisions (Chapter 9), and the interstate compact on juveniles (Chapter 10).

A. General Provisions (Chapter 1)

1. *Purpose.*—A six-part statement of policies and purposes is set forth at the beginning of the new code. A similar statement appears at the beginning of the 1945 codification, but there are some striking differences. For example, the first purpose stated in the new code is "to provide a juvenile justice system that protects the public by enforcing the legal obligations children have to society."¹⁰ By contrast, the 1945 codification contains only a brief reference to enforcing the legal obligations "due" from children, and this appears at the very end of the statement of purpose.¹¹

⁷Act of Mar. 9, 1967, ch. 170, 1967 Ind. Acts 366 (effective July 26, 1967) (codified at IND. CODE §§ 33-13-14-1 to 5 (1976)).

⁸[1967-68] IND. JUD. STUDY COMM'N, BIENNIAL REP. 54.

⁹The code, as finally enacted, had passed through revisions by various organizations, including the Civil Code Study Commission in 1970-71, the Indiana Supreme Court Advisory Committee on Revision of Rules of Procedure and Practice in 1973-74, and the Juvenile Justice Division of the Indiana Judicial Study Commission in 1976-77. See JUVENILE JUSTICE DIVISION, INDIANA JUDICIAL STUDY COMMISSION, INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT ix (1977) [hereinafter referred to as INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT].

¹⁰IND. CODE § 31-6-1-1(1) (Supp. 1978) (effective Oct. 1, 1979). All citations herein to article 6 are from the new juvenile code which will be effective on October 1, 1979.

¹¹*Id.* § 31-5-7-1 (1976) (repealed effective Oct. 1, 1979). All citations herein to article 5 are from the existing Indiana statutes which will be repealed on October 1, 1979.

The second purpose in the new code reflects the due process emphasis generated by the United States Supreme Court in the *Kent* and *Gault* cases. According to this purpose, the code is to "provide a judicial procedure that insures fair hearings" and enforces the legal rights of children and their parents.¹² This emphasis on due process does not appear in the purposes stated in the earlier codification, although the 1945 statement does refer to the enforcement of rights "due" to children.¹³ The reference to the rights of parents, along with the later reference to the obligations of parents, is also a theme in the new code which is not included in the earlier codification.

Providing children with care, guidance, and control is the primary purpose stated in the 1945 statute,¹⁴ and this is repeated in the new code which refers to children in need of "care, treatment, rehabilitation, or protection."¹⁵ Two new purposes appear in the new code, to develop diversionary programs¹⁶ and "to strengthen family life by assisting parents to fulfill their parental obligations."¹⁷ The new code ends with the statement that children are to be removed from their parents only when in the best interest of the child or of public safety,¹⁸ a policy which also appears in the earlier codification.¹⁹

These purposes and policies are reflected throughout the new code and reflect the effort of the General Assembly to provide for the protection of society while retaining a special system of justice for the juvenile offender. In so doing, the General Assembly decided to retain the *parens patriae* concept but attempted to balance it with an emphasis on fundamental due process for juveniles.

2. *Definitions.*—Two major questions that existed under the state's prior juvenile statutes appear to be resolved by the definitions section of the new code. The new code provides that a "child" is a person under eighteen years of age or a person "eighteen (18), nineteen (19), or twenty (20) years of age" who is charged with a delinquent act committed before his eighteenth birthday.²⁰ Under the prior Indiana law, a juvenile who committed an act of delinquency before the age of eighteen years remained subject to juvenile court jurisdiction even after reaching the age of eighteen, with no ap-

¹²*Id.* § 31-6-1-1(2) (Supp. 1978).

¹³*Id.* § 31-5-7-1 (1976).

¹⁴*Id.*

¹⁵*Id.* § 31-6-1-1(3) (Supp. 1978).

¹⁶*Id.* § 31-6-1-1(4).

¹⁷*Id.* § 31-6-1-1(5).

¹⁸*Id.* § 31-6-1-1(6).

¹⁹*Id.* § 31-5-7-1 (1976).

²⁰*Id.* § 31-6-1-2 (Supp. 1978).

parent age limitation.²¹ This apparently placed adults under the juvenile court's jurisdiction even after any reason for exercising such jurisdiction had ended, but the new code places a three-year limitation on the continuation of such jurisdiction.²²

The new code also defines a "crime" as an "offense for which an adult might be imprisoned under the law of the jurisdiction in which it is committed."²³ This would thus appear to authorize an Indiana juvenile court to exercise jurisdiction over a juvenile who is accused of committing an offense in another state or in violation of a federal law. The prior juvenile statutes did not contain a similar provision, and the definition of delinquency was ambiguous in this regard because it referred only to the commission of "an act which, if committed by an adult, would be a crime."²⁴

B. Jurisdiction (Chapter 2)

1. General.—The new juvenile code appears to make a number of substantial changes in the jurisdiction of juvenile courts. The first major change is concerned with the offense of murder. Under the prior statutes, a juvenile court had exclusive jurisdiction over delinquency proceedings involving acts that would be crimes if committed by an adult except for first degree murder and traffic violations.²⁵ The new code continues the exception for traffic violations²⁶ and adds exceptions for violations of laws concerning watercraft and snowmobiles²⁷ and laws protecting fish or wildlife.²⁸ At the same time, the code omits the former exception for first degree murder and thus gives the juvenile court exclusive jurisdiction over all charges involving murder. A subsequent section provides, however, that a child ten years of age or older must be waived when charged with an act that would be murder if committed by an adult

²¹*Id.* § 31-5-7-13 (1976).

²²*Id.* § 31-6-1-2 (Supp. 1978). See *In re Johnson*, 178 F. Supp. 155 (D.N.J. 1957). See also INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION JUVENILE JUSTICE STANDARDS PROJECTS, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 14 (Tent. Draft, 1977). [This project published numerous volumes of standards. Hereinafter the author will be cited as JUVENILE JUSTICE PROJECT; the title of each volume will be cited in full.]

²³IND. CODE § 31-6-1-2 (Supp. 1978).

²⁴*Id.* § 31-5-7-4.1 (1976). See also JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 17 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS (LAW ENFORCEMENT ASSISTANCE ADMINISTRATION), JUVENILE JUSTICE AND DELINQUENCY PREVENTION 295 [hereinafter cited as NATIONAL ADVISORY COMMITTEE].

²⁵IND. CODE § 31-5-7-4.1(a) (1976) (codified as amended at *id.* § 31-5-7-4.1(a) (Supp. 1978)).

²⁶*Id.* § 31-6-2-1(b) (Supp. 1978).

²⁷*Id.* § 31-6-2-1(b). See also *id.* §§ 14-1-1-63, 31-5-7-13.

²⁸*Id.* § 31-6-2-1(b).

unless the court finds that the child should remain within the juvenile justice system.²⁹

By eliminating this exception from the juvenile statutes, the General Assembly purported to resolve the discrepancy between the juvenile statutes and the new criminal code that had existed since October 1, 1977, the effective date of the new criminal code. Under the new criminal code, all distinctions between first and second degree murder were abolished.³⁰ Unfortunately, the juvenile statutes were not amended at the same time and thus continued to contain the distinctions between first and second degree murder, authorizing a juvenile court to process only second degree murder offenses.³¹

Having decided to resolve the discrepancy by giving the juvenile courts exclusive jurisdiction over all juveniles charged with offenses involving murder, the General Assembly omitted the first degree murder exception from the new juvenile code. It was still necessary, however, for the General Assembly to resolve the conflict on an interim basis until October 1, 1979, the effective date of the new juvenile code. The new provision of the juvenile code could have been made effective immediately on an emergency basis, but the General Assembly decided to enact a separate statute which excepted all murder charges from juvenile court jurisdiction.³² This statute was not effective until March 9, 1978, and thus Indiana's courts must still attempt to discern the legislative intent concerning the handling of offenses involving murder between October 1, 1977, and March 9, 1978. The inconsistent action of the General Assembly in enacting contradictory statutes in the same legislative session offers little guidance for resolving this issue.

As a second major change, the new code eliminates juvenile court jurisdiction over dependency and neglect proceedings and replaces this with jurisdiction over proceedings concerning children in need of services.³³ Although the drafters of the proposed code intended to combine the definitions of dependency and neglect into the one definition of children in need of services,³⁴ the new code has in fact eliminated the juvenile court's jurisdiction over children formerly considered to be dependent. This occurred, possibly through inadvertence, because of the manner in which the proposed definition of "child in need of services" was amended and ultimately

²⁹*Id.* § 31-6-2-4(c).

³⁰*Id.* § 35-42-1-1.

³¹*Id.* § 31-5-7-4.1, .14(b) (codified as amended at IND. CODE § 31-5-7-4.1(a) (Supp. 1978)).

³²Act of Mar. 9, 1978, Pub. L. No. 2, § 3109, 1978 Ind. Acts 2, (codified at IND. CODE § 31-5-7-4.1 (Supp. 1978)).

³³IND. CODE § 31-6-2-1(a) (Supp. 1978). *See also id.* § 33-12-2-3 (1976).

³⁴See INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT, *supra* note 9, at xi.

enacted by the General Assembly in the new code,³⁵ to be discussed hereafter.

Otherwise, the juvenile courts will continue to have exclusive jurisdiction over delinquent children, children in need of services, and paternity proceedings.³⁶ Exclusive jurisdiction is extended to proceedings to terminate the parent-child relationship³⁷ whereas the juvenile court previously had authority to terminate the relationship only as a dispositional alternative in an appropriate dependency or neglect proceeding.³⁸ Likewise, the courts will continue to have concurrent jurisdiction over adults charged with neglect of a dependent³⁹ and contributing to the delinquency of a minor.⁴⁰ Concurrent jurisdiction is also extended to include proceedings involving adults charged with violating the compulsory school attendance law.⁴¹

2. *Criminal court jurisdiction.*—Two provisions of the new code were enacted to authorize the extradition of children who commit criminal acts and then go to another state. The rendition amendment to the Interstate Compact on Juveniles was adopted and authorizes extradition between states adopting the compact.⁴² In order to authorize the extradition of juvenile offenders from states that have not adopted the amendment, the code also gives criminal courts concurrent jurisdiction over juveniles who have left the state.⁴³ Any juvenile returned under this latter provision is then to be transferred from the criminal court to the juvenile court for further action.⁴⁴

If a defendant is brought to trial in a criminal court and it is determined that the alleged crime was committed before the defendant's eighteenth birthday, the code provides that the defendant is to be transferred immediately to the juvenile court.⁴⁵ This provision is essentially the same as the provision in the earlier statutes,⁴⁶ but it does not appear to be consistent with the new definition of "child" in the definitions section as discussed above. If the definition of "child" was intended to limit the time during which a person would

³⁵IND. CODE § 31-6-4-3 (Supp. 1978).

³⁶*Id.* § 31-6-2-1(a). *See also id.* § 33-12-2-3 (1976).

³⁷*Id.* § 31-6-2-1(a) (Supp. 1978).

³⁸*In re* Perkins, 352 N.E.2d 602 (Ind. Ct. App. 1976) (construing IND. CODE §§ 31-5-7-7, -15 (1976)).

³⁹IND. CODE §§ 31-6-2-1(c), 33-12-2-3(b) (Supp. 1978).

⁴⁰*Id.* §§ 31-6-2-1(c), 33-12-2-3(b) (Supp. 1978).

⁴¹*Id.* § 31-6-2-1(c) (Supp. 1978). *See also id.* § 20-8-1-3-32 (1976).

⁴²*Id.* § 31-6-10-1 (amend. 2) (Supp. 1978).

⁴³*Id.* § 31-6-2-1(e).

⁴⁴*Id.* § 31-6-2-2(b).

⁴⁵*Id.* § 31-6-2-2(a) (1976).

⁴⁶*Id.* § 31-5-7-13 (Supp. 1978).

continue subject to juvenile court jurisdiction, then this section should be amended to reflect that limitation.

3. *Waiver of jurisdiction.*—Although the waiver provision of the new code appears to be similar to the prior statute except for the waiver of murder offenses, as discussed above, there are a number of other substantial changes in the provision. The new code clearly provides that waiver of jurisdiction includes the offense charged and all lesser included offenses.⁴⁷ This provision resolves an issue that was not covered in the earlier statutes, although the Indiana Supreme Court unanimously endorsed this view in dicta in *Blythe v. State*,⁴⁸ a case that was decided twenty days after the new juvenile code was signed into law. In fact, the supreme court suggested in *Blythe* that either a conviction or a guilty plea to a lesser included offense would be proper after waiver to a criminal court. The new code, however, makes no reference to the propriety of plea bargaining concerning a lesser included offense.

The new code furthermore provides that a juvenile court must waive a child who is alleged to have committed a Class A or Class B felony when sixteen years of age or older unless the court finds that the child should remain in the juvenile system.⁴⁹ By contrast, the former statute provided for such waiver only with reference to eleven specifically enumerated offenses, including offenses such as second degree murder, kidnapping, rape, robbery, and first degree burglary.⁵⁰ Waiver of jurisdiction has been a highly controversial subject in the General Assembly in recent years as reflected by the fact that the waiver provisions have been amended four times since 1975. In fact, the General Assembly enacted two inconsistent provisions during the 1978 legislative session, just as it did with reference to the handling of murder offenses. Class A and Class B felonies were included in the new code's waiver provision concerning serious offenses, as noted above, but the General Assembly also enacted a separate statute which substituted "forcible felony" for the list of eleven offenses in the prior waiver statute.⁵¹ This provision was effective on March 9, 1978, and presumably will be superseded by the new code on October 1, 1979.

Finally, the code provides that a waiver motion cannot be filed after the juvenile has admitted the allegations in the juvenile court

⁴⁷*Id.* § 31-6-2-4(a).

⁴⁸373 N.E.2d 1098, 1100 (Ind. 1978).

⁴⁹IND. CODE § 31-6-2-4 (Supp. 1978).

⁵⁰*Id.* § 31-5-7-14(b) (1976) (currently codified as amended at *id.* § 31-5-7-14(b) (Supp. 1978)).

⁵¹Act of Mar. 9, 1978, Pub. L. No. 2, § 3112, 1978 Ind. Acts 2 (codified at IND. CODE § 31-5-7-14 (Supp. 1978)).

or jeopardy has attached by the swearing of a witness after a denial of the allegations.⁵² This provision reflects the decision of the United States Supreme Court in *Breed v. Jones*⁵³ which applied the constitutional provisions concerning double jeopardy to juvenile court proceedings.

C. Rights and Effect of Adjudication (Chapter 3)

1. *Rights of children.*—After restating several basic rights that children have in juvenile proceedings, the new code provides that a child who is charged with a delinquent act is entitled to be represented by counsel.⁵⁴ This provision makes no distinction between acts that would be crimes if committed by an adult and status offenses, a pattern that is generally reflected throughout the new code. The provision is more important, however, because of what is not stated and the ambiguities that thus remain. As a general rule, a person is entitled to the assistance of counsel in a criminal proceeding only at the critical stages of the criminal process.⁵⁵ The new code simply provides that a juvenile has the right to counsel with no attempt to set forth a list of the critical stages of the juvenile process. This may indicate a legislative intent to allow the courts to determine the critical stages on a case by case basis, or it may be interpreted to mean that a juvenile is entitled to counsel throughout the entire process. Furthermore, the provision refers only to charges of delinquency and thus juveniles are not entitled to counsel in dependency and neglect proceedings (now called proceedings to determine whether a child is in need of services). Another provision in the code, however, does give the court discretionary authority to appoint counsel for juveniles in "any other proceeding."⁵⁶

According to the code, a child is also entitled to "remain silent" in juvenile court proceedings.⁵⁷ An earlier draft of the code provided that a child had the right to "refrain from self-incrimination" in juvenile proceedings. As finally enacted, the code may be interpreted to mean that a child has the privilege against self-incrimination in juvenile proceedings, or it may mean that a child has even more protection than provided by the privilege against self-incrimination. For example, the provision could be interpreted

⁵²IND. CODE § 31-6-2-4(e) (Supp. 1978).

⁵³421 U.S. 519 (1975). See *Walker v. State*, 349 N.E.2d 161 (Ind.), cert. denied, 429 U.S. 943 (1976).

⁵⁴IND. CODE § 31-6-3-1(b) (Supp. 1978).

⁵⁵See *United States v. Wade*, 388 U.S. 218 (1967); *Winston v. State*, 263 Ind. 8, 323 N.E.2d 228 (1975).

⁵⁶IND. CODE § 31-6-7-2(a) (Supp. 1978).

⁵⁷*Id.* § 31-6-3-1(b).

to mean that a child may not be required to give voice exemplars or to speak for purposes of voice identification.⁵⁸

2. *Rights of adults.*—As noted in the discussion of the purposes of the code, an emphasis on the rights and obligations of parents appears throughout the new code. One of the major changes in the new code is the provision that a parent has the right to appear in his own behalf in a dependency or neglect proceeding (now called a proceeding to determine if the child is a child in need of services).⁵⁹ Thus both the child and the parent are parties to such proceedings with independent rights to participate fully in the confrontation of witnesses and the presentation of evidence. The code provides that the parent has the right to counsel only in proceedings to terminate the parent-child relationship, but the court is given discretionary authority to appoint counsel for the parent "in any other proceeding."⁶⁰

D. Proceedings Concerning Delinquent Children and Children in Need of Services (Chapter 4)

Chapter four, "Delinquent Children and Children in Need of Services," and chapter seven, "Procedure in Juvenile Court," are the primary chapters in the new juvenile code. Chapter four is purportedly a substantive part of the code whereas chapter seven is expressly designated as procedural. Unfortunately, both chapters reflect the difficulty, if not impossibility, of defining and separating substance from procedure. For example, chapter four includes detailed procedures for detention hearings⁶¹ whereas chapter seven includes the provisions concerning venue.⁶² In fact, chapter four sets forth the basic framework and format for proceedings in the juvenile court, beginning with the definitions of delinquent children and children in need of services and also including the procedures for taking children into custody and adjudicating allegations concerning them.

1. *Definitions.*—Major changes have been made in most of the definitions concerning children subject to juvenile court jurisdiction as compared to the prior statutes. Delinquency still includes criminal acts and the traditional status offenses despite the growing effort to remove status offenses from juvenile court jurisdiction.⁶³

⁵⁸See generally United States v. Dionisio, 410 U.S. 1 (1973); United States v. Wade, 388 U.S. 218 (1967).

⁵⁹IND. CODE § 31-6-3-2 (Supp. 1978).

⁶⁰*Id.* § 31-6-7-2(b) (Supp. 1978). *Contra*, Davis v. Page, 442 F. Supp. 258, 263-64 (S.D. Fla. 1977).

⁶¹IND. CODE §§ 31-6-4-5 to 6 (Supp. 1978).

⁶²*Id.* § 31-6-7-7.

⁶³See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO

The changes in the criminal acts have been discussed above, but there are also significant changes in the definitions of the various status offenses. Running away from home has been transferred from the former dependency category⁶⁴ and is once again included as a status offense under delinquency.⁶⁵ The new definition, however, makes running away an offense only if the act is done without permission and the parent then requests the child's return.⁶⁶ Incorrigibility, ungovernability, and being beyond the control of a parent presumably are included within the offense of habitual disobedience to a parent,⁶⁷ and thus the new code includes only the latter offense. Even this offense has been modified, however, so that it covers only habitual disobedience to "reasonable and lawful commands" of a parent.⁶⁸ Although the new emphasis on reasonableness of the commands could lead to an increased involvement of juvenile courts in internal family matters and even an unwarranted judicial supervision and limitation on traditional parental authority, hopefully the courts will exercise judicial restraint and will limit this provision to situations in which parents abuse or seriously misuse their parental authority.⁶⁹ Habitual truancy continues to be a status offense although the code now simply refers to the violation of the compulsory school attendance law.⁷⁰ Since the school attendance law provides for court action when a juvenile is habitually absent or a confirmed truant,⁷¹ there is in fact no change in this status offense. Finally, the curfew provision has been substantially revised at least to make it more understandable if not more enforceable.⁷²

One of the most confusing changes in the code is the newly introduced distinction between a "delinquent act" and a "delinquent child." The code first states that a child "commits a delinquent act" if he commits one of the five acts discussed above. The code then provides that a child "is a delinquent child" if he (1) commits an act that would be a crime if committed by an adult or (2) commits any of the status offenses and also is in need of care, treatment, or rehabilitation.⁷³ This might appear to be a reasonable distinction be-

JUVENILE DELINQUENCY AND SANCTIONS 23 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 295.

⁶⁴IND. CODE § 31-5-7-5 (1976).

⁶⁵*Id.* § 31-6-4-1(a)(2) (Supp. 1978).

⁶⁶*Id.*

⁶⁷See *id.* § 31-5-7-4.1(a)(2) (1976).

⁶⁸*Id.* § 31-6-4-1(a)(4) (Supp. 1978).

⁶⁹See NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 327.

⁷⁰IND. CODE § 31-6-4-1(a)(3) (Supp. 1978).

⁷¹*Id.* § 20-8.1-3-31 (1976).

⁷²Compare *id.* § 31-6-4-2 (Supp. 1978) with *id.* § 31-5-7-4.1(a)(5).

⁷³*Id.* § 31-6-4-1(b).

tween delinquency based on criminal conduct and delinquency based on status offenses, but the code later provides that the juvenile court cannot authorize the filing of a petition or the taking of a child into custody for delinquency based upon a criminal act unless the court also finds that the child is in need of care, treatment, or rehabilitation.⁷⁴ Since the end result thus appears to be the same for delinquency based on a criminal act and delinquency based on a status offense, the distinction should be eliminated in order to avoid the possibility of confusion.

The most obvious change in the definitions section is the new definition concerning children in need of services⁷⁵ which replaces the former definition of neglected children⁷⁶ and eliminates the former definition of dependent children.⁷⁷ Despite recent warnings that the use of labels such as "children in need of supervision" could have a "potentially devastating effect on a child,"⁷⁸ the General Assembly followed the lead of a number of other states in adopting the new definition.⁷⁹ The drafters of the code intended to merge both dependency and neglect into the new definition concerning children in need of services,⁸⁰ but their proposal was amended by the General Assembly and the former definition of dependency was eliminated completely. The primary distinction between dependency and neglect under the former statutes was the nature of the parent's responsibility in bringing about the child's condition. If the parent was at fault, the child was a neglected child; if the parent was not at fault, the child was simply a dependent child. As proposed by the drafters of the code, the definition of a child in need of services included a child "without necessary food, clothing, shelter, medical care, or supervision" and a child "injured by the act or omission of his parent."⁸¹ Dependency would have been covered by the first provision, and neglect would have been covered by the second provision since the proposed draft also defined "omission" so as to involve the fault of the parent.⁸² The General Assembly's amendment, however, incorporated a requirement of parental fault not

⁷⁴See *id.* § 31-6-4-9(b), (c). See also *id.* § 31-6-4-12(a).

⁷⁵*Id.* § 31-6-4-3.

⁷⁶*Id.* § 31-5-7-6 (1976).

⁷⁷*Id.* § 31-5-7-5.

⁷⁸See NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 312.

⁷⁹See COLO. REV. STAT. § 19-1-103(5) (1973); WIS. STAT. ANN. § 48-12 (West Supp. 1978-79). See also N.Y. JUD. LAW § 712 (McKinney Supp. 1977-78).

⁸⁰See INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT, *supra* note 9, at xi.

⁸¹*Id.* at 22.

⁸²"An omission is an occurrence in which the parent, guardian, or custodian allowed his child to receive any injury which he had a reasonable opportunity to prevent or mitigate." *Id.* (enacted in the new code as IND. CODE § 31-6-4-3(b) (Supp. 1978)).

only in the second provision but also in the first provision as well. Thus the new code now provides that a child in need of services is a child who is in need of care, treatment, or rehabilitation when the child's physical or mental condition is substantially impaired by the "refusal or neglect of his parent" to provide him with necessities or when the child's physical health is seriously endangered "due to injury by the act or omission of his parent."⁸³

By enacting this provision, the General Assembly adopted a revised definition that is in accord with the recent recommendation of the National Advisory Committee on Criminal Justice Standards and Goals that a parent's inability to care for a child because of financial or social problems should be a basis for providing only voluntary services and should not authorize a court's coercive intervention.⁸⁴ At the same time, the General Assembly continued to emphasize parental fault despite the Committee's recommendation that parental fault should not be a consideration in determining when a child is otherwise in need of services.⁸⁵

The new definition also provides that a child in need of services is a child who "substantially endangers his own health or the health of another."⁸⁶ Since this is included as a third alternative in a definition that otherwise stresses parental fault, the provision might be interpreted to mean that a child is in need of services when he endangers his own health or the health of another because of a lack of parental care or supervision. If not, then the provision would appear to give the juvenile court broad general discretion to provide preventive care and treatment for a child, depending on the meaning given to the term "health." In addition, the provision would appear to authorize the juvenile court to treat at least some delinquent children as children in need of services.

2. *Detention.*—A three step detention review process is established by the new code and this process is to begin as soon as a juvenile is taken into custody. Initially, the law enforcement officer who takes a child into custody without a court order⁸⁷ for an act of delinquency based upon criminal acts must release the child to his parent on the parent's written promise to bring the child to court,

⁸³IND. CODE § 31-6-4-3 (Supp. 1978).

⁸⁴NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 343.

⁸⁵*Id.*

⁸⁶IND. CODE § 31-6-4-3 (Supp. 1978).

⁸⁷The new code clarifies an issue that existed under the prior statutes by providing that a law enforcement officer may take a child into custody without a prior court order when acting with probable cause to believe that the child has committed a delinquent act. On the other hand, a child believed to be a child in need of services can be taken into custody only if the officer does not have time to obtain a court order. IND. CODE § 31-6-4-4 (Supp. 1978). *See also id.* § 31-5-7-12(c) (1976).

subject to four exceptions. The officer may detain the child if (1) the child is unlikely to appear, (2) there is probable cause to believe that the child has committed murder or a Class A or Class B felony, (3) detention is essential to protect the child or community, or (4) the parent cannot be located.⁸⁸ The officer is thus required to review the need for custody immediately after taking a juvenile into custody. A similar duty existed under the prior statute which required the officer to release the child on the parent's written promise unless it was "impracticable" to do so.⁸⁹ Since "impracticable" was ambiguous, the term was eliminated and the four specific exceptions were placed in the code.

If the officer decides to detain the child in custody, the child is delivered to an intake officer who is required to review the detention decision and to release the child, subject to the same four exceptions.⁹⁰ Finally, if the intake officer decides to detain the child, a detention hearing must be held within forty-eight hours and the juvenile court must review the decision to detain. The court, however, must release the child on the parent's written promise unless it finds that the child is unlikely to appear or that detention is essential to protect the child or community.⁹¹ The other two exceptions were omitted, apparently by inadvertence, and should be added by an amendment to the code.

The requirement of a detention hearing within forty-eight hours is a distinct change from the prior statute which required a hearing only if requested in writing by the child or some person on his behalf.⁹² This change probably was necessary in view of the United States Supreme Court decision in *Gerstein v. Pugh*.⁹³ Preventive detention was authorized under the former statute⁹⁴ and is continued under the new code despite the fact that it is not authorized with reference to adult criminal defendants.⁹⁵ The new code does not authorize releasing a juvenile on bail, and the questionable provisions in the prior statutes which purported to authorize bail⁹⁶ were repealed.⁹⁷

⁸⁸*Id.* § 31-6-4-5(a) (Supp. 1978).

⁸⁹*Id.* § 31-5-7-12(a) (1976).

⁹⁰*Id.* § 31-6-4-5(d) (Supp. 1978).

⁹¹*Id.* § 31-6-4-5(f).

⁹²*Id.* § 31-5-7-12(b) (1976).

⁹³420 U.S. 103 (1975). See *Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976).

⁹⁴IND. CODE § 31-5-7-12(b) (1976).

⁹⁵*Hobbs v. Lindsay*, 240 Ind. 74, 78-79, 162 N.E.2d 85, 88 (1959).

⁹⁶IND. CODE §§ 31-5-2-1, -5 (1976). These statutory provisions authorized bail for juveniles, but they were questionable because they were remnants of the 1903 codification of juvenile statutes. As such, they purported to authorize not only bail but also trial by jury in juvenile cases, a provision that was clearly superseded and eliminated by the 1945 codification. See *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319 (1970); IND. CODE § 31-5-7-15 (1976).

⁹⁷Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196.

A similar three-step process is established with reference to delinquency based on status offenses and children in need of services. A child who is taken into custody must be released unless (1) shelter care is necessary to protect the child, (2) the child is unlikely to appear, (3) the child does not want to be released to his parent, or (4) the parent cannot be located.⁹⁸ In such cases, the same four exceptions are to be considered by the law enforcement officer, the intake officer, and the juvenile court.

3. *Initiating formal action.*—A juvenile proceeding may be initiated under the new code when information concerning a delinquent child or a child in need of services is given in writing to the juvenile court's intake officer.⁹⁹ The officer is then to conduct a preliminary inquiry which "is an informal investigation into the facts and circumstances reported to the court."¹⁰⁰ By these provisions, the General Assembly resolved two major issues that existed under the prior statutes.

The first issue was concerned with the manner in which a juvenile proceeding could be initiated. Under one of the prior statutes, a juvenile court was authorized to conduct a preliminary inquiry whenever it received "information" concerning a delinquent, dependent, or neglected child.¹⁰¹ There was no provision in the statute concerning the procedure for the giving of this information, and there was no requirement that the information even be in writing. A second statute, however, provided that a juvenile could be brought before a juvenile court only by a "petition praying that the person be adjudged delinquent or dependent or neglected" or by transfer from a criminal court.¹⁰² These two statutes could have been interpreted to require the following four steps in bringing a juvenile before the juvenile court: (1) The giving of information to the court in any manner; (2) the conducting of a preliminary inquiry concerning the information; (3) the consideration of the preliminary inquiry and authorization of a formal petition; and (4) the filing of a formal petition. Instead of reaching this conclusion, however, the Indiana Court of Appeals interpreted the two statutes together as requiring a "petition" to initiate the preliminary inquiry as well as a subsequent, formal petition alleging delinquency, dependency, or neglect.¹⁰³ The first petition was apparently an "informational peti-

⁹⁸IND. CODE § 31-6-4-6 (Supp. 1978).

⁹⁹*Id.* §§ 31-6-4-7(a), -8(a).

¹⁰⁰*Id.* §§ 31-6-4-7(b), -8(b).

¹⁰¹*Id.* § 31-5-7-8 (1976).

¹⁰²*Id.* § 31-5-7-7.

¹⁰³Seay v. State, 337 N.E.2d 489 (Ind. Ct. App. 1975), *rehearing denied*, 340 N.E.2d 369 (1976).

tion" whereas the latter was the "formal petition" containing the specific allegations in question.

In view of the confusion caused by the requirement of having two "petitions" in each juvenile proceeding, the General Assembly decided to adopt the four steps suggested above, with one modification. As finally enacted, the new code authorizes the juvenile court to conduct a preliminary inquiry after receiving information concerning a juvenile, but the information must at least be in writing.¹⁰⁴ There is no requirement that the writing be in the form of a petition, however, and the statute relied on by the court of appeals was simply repealed and omitted from the new code.¹⁰⁵ Thus it appears that a written complaint, a letter, or even a police report would be sufficient to justify the initiation of a preliminary inquiry.

The second issue was concerned with the nature of the preliminary inquiry to be conducted by the court after receiving information concerning a juvenile. The prior statutes required a "preliminary inquiry" and provided that the inquiry should include a "preliminary investigation" into the facts and circumstances and the juvenile's background "whenever practicable."¹⁰⁶ As interpreted by the Indiana Court of Appeals, the preliminary inquiry and investigation were jurisdictional prerequisites for juvenile court action,¹⁰⁷ but there was no clear decision concerning the nature of the preliminary inquiry and investigation or the difference, if any, between the inquiry and the investigation. Thus it was possible to interpret the statute as requiring an informal investigation or information gathering process followed by a formal preliminary inquiry or court hearing to consider the propriety of authorizing a formal petition. The issue was finally resolved in the code by the provision that a "preliminary inquiry is an informal investigation,"¹⁰⁸ although it might have been better to eliminate the use of the term "inquiry" altogether in order to avoid any possible confusion. Thus the intake officer is to conduct an informal, information gathering investigation, and his report is to be considered by the court, *ex parte*, in deciding whether to authorize the filing of a petition.

4. *Role of the prosecuting attorney.*—After extensive debate, the General Assembly reached a compromise concerning the role of the prosecuting attorney in juvenile proceedings. Under the prior statutes, prosecutorial discretion in juvenile proceedings was exercised by the juvenile court judge assisted by his probation officer.

¹⁰⁴IND. CODE §§ 31-6-4-7(a), -8(a) (Supp. 1978).

¹⁰⁵Act of Mar. 10, 1978, Pub. L. No. 136, § 57, 1978 Ind. Acts 1196.

¹⁰⁶IND. CODE § 31-5-7-8 (1976).

¹⁰⁷Ingram v. State, 160 Ind. App. 188, 310 N.E.2d 903 (1974).

¹⁰⁸IND. CODE §§ 31-6-4-7(b), -8(b) (Supp. 1978).

The probation officer conducted the preliminary inquiry which was then submitted to the judge for consideration. If appropriate, the judge would then authorize the probation officer to file a petition concerning a delinquent, dependent, or neglected child.¹⁰⁹ No reference was made in the juvenile statutes concerning the role of the prosecuting attorney, and the practice therefore varied from court to court. Reflecting the recent trend,¹¹⁰ the General Assembly removed the prosecutorial function from the judge but compromised by dividing the function between the prosecuting attorney and the county welfare attorney. As a minimal requirement, the code requires the prosecutor to handle all delinquency cases involving acts that would be crimes if committed by an adult.¹¹¹ Either the prosecutor or the county welfare attorney may handle status offenses¹¹² and allegations concerning children in need of services.¹¹³ No guidance is given in the code concerning the division of authority in the latter two types of cases, but the code does provide that the decision of one office concerning children in need of services is final only as to that office.¹¹⁴ Otherwise, the code provides only that the person who requests authorization to file a petition must thereafter represent the interests of the state in all subsequent proceedings on the petition.¹¹⁵ The role of the person representing the state is further strengthened by a final provision that the court must dismiss any petition upon motion of the person representing the state.¹¹⁶ This may even be stronger than the authority given to a prosecutor in criminal cases since the prosecutor must at least state the reasons for his motion to dismiss a criminal indictment or information.¹¹⁷

5. *Informal adjustment.*—Various organizations have recently recommended that pre-adjudicatory programs for diversion and informal adjustment should be strengthened but that the authority for such programs should be given to agencies other than the courts.¹¹⁸ Despite such recommendations, the General Assembly enacted a legal basis for court-sanctioned informal adjustments which un-

¹⁰⁹*Id.* § 31-5-7-8 (1976).

¹¹⁰JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO PROSECUTION 25 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 503.

¹¹¹IND. CODE § 31-6-4-7(d) (Supp. 1978).

¹¹²*Id.* § 31-6-4-9(a).

¹¹³*Id.* § 31-6-4-10(a).

¹¹⁴*Id.* § 31-6-4-8(c).

¹¹⁵*Id.* §§ 31-6-4-9(a), -10(a).

¹¹⁶*Id.* § 31-6-4-11.

¹¹⁷*Id.* § 35-3.1-1-13(a) (1976).

¹¹⁸JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION 33 (Tent. Draft, 1977) NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 216, 655.

doubtedly were being utilized by juvenile courts as a general practice. The original draft of the juvenile code would have placed informal adjustments under the control of the prosecutor or county welfare attorney,¹¹⁹ but this was changed before the proposed code was submitted to the General Assembly. As enacted, the code authorized the courts to approve a program of informal adjustment by the court's intake officer after completion of the preliminary inquiry. Three basic protections are included in the provision for the benefit of the juveniles involved. The primary requirement is that the intake officer have probable cause to believe that the juvenile is subject to juvenile court jurisdiction. In addition, the child and his parent must consent to the program and the program is limited to a period of six months.¹²⁰ There is no provision, however, to ensure that no action can be taken on the allegations involved once the juvenile has completed the program of informal adjustment.¹²¹

6. *Hearings.*—The code provides for an initial hearing on the petition, a fact-finding hearing, and a dispositional hearing to complete the processing of juvenile cases. The term "initial hearing" on the petition reflects the difficulty in choosing an appropriate name for this hearing.¹²² Other terms have been suggested, including "initial appearance"¹²³ and "arraignment,"¹²⁴ but there are difficulties with both of these terms since the juvenile may in fact have appeared in court at an earlier time in a detention hearing and the term "arraignment" has specific criminal court connotations. In any event, the code provides detailed procedures for conducting the initial hearing on the petition¹²⁵ which in fact is quite similar to an arraignment in a criminal proceeding.¹²⁶

A fact-finding hearing is the equivalent of a criminal trial and is to be held separately from the initial hearing, except that it may be held immediately after the initial hearing with the consent of the juvenile and his counsel or parent.¹²⁷ At the close of the evidence in the fact-finding hearing, the court is authorized to withhold judgment and continue the case for six months unless the child or his parent requests the court to enter the judgment.¹²⁸ This is a substan-

¹¹⁹INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT, *supra* note 9, at 40.

¹²⁰IND. CODE § 31-6-4-12 (Supp. 1978).

¹²¹See generally JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO THE JUVENILE PROBATION FUNCTION 33.

¹²²IND. CODE § 31-6-4-13(a) (Supp. 1978).

¹²³JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 48 (Tent. Draft, 1977).

¹²⁴NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 383.

¹²⁵IND. CODE § 31-6-4-13 (Supp. 1978).

¹²⁶See *id.* § 35-4.1-1-1 (1976).

¹²⁷*Id.* § 31-6-4-13(h) (Supp. 1978).

¹²⁸*Id.* § 31-6-4-14(e).

tial change from the prior statute which authorized the court to withhold judgment for two years or for ninety days even when the juvenile requested the entering of a judgment.¹²⁹ At the same time, the General Assembly did not agree with the view that a juvenile court should have no authority at all to withhold judgment.¹³⁰

The dispositional hearing completes the adjudicatory process and is not to be held until after a predisposition report has been prepared by the court's probation officer or caseworker.¹³¹ If the court concludes that the juvenile is mentally ill or developmentally disabled, it may continue the dispositional hearing and refer the juvenile to the appropriate court, such as the probate court, which handles such matters.¹³²

7. *Dispositional alternatives.*—Four major changes concerning dispositional alternatives are included in the new code. First, the new code prohibits the placement of juveniles in a secure facility unless they have been adjudicated delinquent for committing an act that would be a crime if committed by an adult.¹³³ Thus the General Assembly extended to status offenders the protection which had been given to dependent and neglected children two years earlier.¹³⁴ This change is consistent with the growing national trend in this direction.¹³⁵ The second major change points to the opposite direction and authorizes the confinement of juveniles who commit criminal acts to serve ten days in confinement in the juvenile part of the county jail, on either a continuous or an intermittent basis.¹³⁶ The original proposal which was submitted to the General Assembly would have authorized confinement for a period of thirty days,¹³⁷ but this was ultimately amended during the legislative session and was reduced to ten days.

¹²⁹*Id.* § 31-5-7-15 (1976).

¹³⁰See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO ADJUDICATION 64 (Tent. Draft, 1977).

¹³¹IND. CODE § 31-6-4-15(a) (Supp. 1978).

¹³²*Id.* § 31-6-4-16(c).

¹³³*Id.* § 31-6-4-16(e). By enacting this provision, the General Assembly took one of the steps which was necessary to make the state eligible for federal funds under the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601 (1976). In order to be eligible for funds under the Act, the state must provide that dependent or neglected children and juveniles charged with offenses that would not be crimes if committed by an adult may not be placed in juvenile detention or correctional facilities but must be placed in shelter care facilities. 42 U.S.C. § 5633(a)(12) (Supp. 1978).

¹³⁴*See id.* §§ 31-5-7-12.2, 20-8.1-3-31 (1976).

¹³⁵See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO NON-CRIMINAL MISBEHAVIOR 55 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 480.

¹³⁶IND. CODE § 31-6-4-16(g)(5), (h) (Supp. 1978).

¹³⁷INDIANA JUVENILE CODE: PROPOSED FINAL DRAFT, *supra* note 9, at 49.

A provision for the emancipation of a juvenile upon his request is the third major change in the code. This provision authorizes the court to emancipate a child, partially or completely, if the child wishes to be free from parental control, no longer needs parental control or protection, and is able to support himself independently.¹³⁸ It is based on the recommendation of the National Advisory Committee on Criminal Justice Standards and Goals,¹³⁹ but it should be seriously reconsidered by the General Assembly. The National Advisory Committee's commentary suggests that the authority should not be exercised unless "all other available resources to achieve family harmony have been tried and have failed,"¹⁴⁰ but this limitation is not embodied in the provision in any form. Thus, the provision authorizes court action in favor of a juvenile who wishes to be free of parental control without any apparent duty to consider the interests or rights of the parents involved.

The final major change introduces the concept of family participation in the dispositional phase of the juvenile proceeding. Under this provision, the parent, guardian, or custodian of a child may be required to obtain assistance in fulfilling his parental obligations, provide special care or treatment for the child, or work with a person who is providing care or treatment for the child.¹⁴¹ This also follows the recommendation of the National Advisory Committee¹⁴² and should strengthen the ability of a juvenile court in its efforts to provide needed care and treatment for juveniles.

8. *Review of dispositional orders.*—Three separate provisions in the new code provide for the subsequent review and modification of a juvenile court's dispositional orders. In the jurisdictional section, it is provided that a juvenile continues subject to the court's jurisdiction until reaching twenty-one years of age unless the court orders otherwise or guardianship of the child is awarded to the department of correction.¹⁴³ This is essentially the same as the provision in the prior statute.¹⁴⁴ The new code adds, however, that the department of correction may request a modification of the judgment, presumably concerning a juvenile committed to its custody.¹⁴⁵ A second provision appears in the code's procedural chapter and provides that the court may modify its dispositional order at any time while it continues to retain jurisdiction, upon either its own

¹³⁸IND. CODE § 31-6-4-16(e)(5) (Supp. 1978).

¹³⁹NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 482.

¹⁴⁰*Id.*

¹⁴¹IND. CODE § 31-6-4-16(i) (Supp. 1978).

¹⁴²NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 480.

¹⁴³IND. CODE § 31-6-2-3 (Supp. 1978).

¹⁴⁴*Id.* § 31-5-7-7 (1976).

¹⁴⁵*Id.* § 31-6-2-3(b) (Supp. 1978).

motion or the motion of the child or other specific interested persons.¹⁴⁶ This provision is also essentially the same as in the prior statute, although the number of persons authorized to request modification appears to be increased somewhat.¹⁴⁷

The primary change, however, appears in the new provision of the code which mandates a continuing review of the court's dispositional orders. Under this provision, the court must hold a formal hearing at least once every eighteen months after entering a dispositional order to determine if the disposition is meeting the court's objectives and should be continued or modified.¹⁴⁸ If the objectives have in fact been accomplished, the juvenile must be discharged.¹⁴⁹ Furthermore, the court must hold the hearing every six months after any dispositional order is entered that removes a child from his parent, and the state must show that the child should not be returned to his parent.¹⁵⁰ Finally, the probation department must prepare a report on the progress of all juveniles every six months, regardless of the nature of the dispositional order.¹⁵¹ These provisions make no distinctions between delinquent children and children in need of services and thus appear to extend far beyond the recent recommendations which would require a six-month review only in those cases other than delinquency based on criminal misconduct.¹⁵² The General Assembly should seriously reconsider the effect of these provisions, especially with reference to delinquency based on criminal misconduct.

E. Termination of the Parent-Child Relationship (Chapter 5)

Whereas the prior juvenile statutes authorized the termination of parent-child relationships in neglect or dependency proceedings only if the parents were at fault or otherwise unable to provide care for their children,¹⁵³ the new code contains provisions which are essentially in accord with the recent recommendation of the Na-

¹⁴⁶*Id.* § 31-6-7-16.

¹⁴⁷*Id.* § 31-5-7-17 (1976).

¹⁴⁸*Id.* § 31-6-4-19 (Supp. 1978).

¹⁴⁹*Id.* § 31-6-4-19(a).

¹⁵⁰*Id.* § 31-6-4-19(d). Although this provision does not specifically state that there must be a formal hearing, it does provide that the state must show that the child should not be returned to the parent.

¹⁵¹*Id.* § 31-6-4-19(b).

¹⁵²JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO NON-CRIMINAL MISBEHAVIOR 58 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 496. Compare JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO DISPOSITION 126 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 475.

¹⁵³IND. CODE §§ 31-5-7-5 to 6 (1976). See generally *In re Perkins*, 352 N.E.2d 502 (Ind. Ct. App. 1976).

tional Advisory Committee to make the interests of the child the primary concern in termination decisions.¹⁵⁴ Thus the code provides for the termination of the relationship over the objections of the parent if the child has been removed from the parents for a period of six months and termination would be in the best interests of the child. At the same time, parental rights are still somewhat protected by two requirements. Termination is proper only if (1) there is a reasonable probability that the conditions resulting in removal of the child will not be remedied and (2) reasonable services have been offered to help the parent fulfill his parental obligations and have been refused or ineffective.¹⁵⁵

These provisions may be a reasonable compromise in balancing the competing interests between a child and his parents, but the General Assembly has introduced a new provision that is highly questionable at best. Under this provision, a county welfare department is required to file a petition for termination whenever requested to do so by the parents. Termination may then be ordered if it is in the child's best interest,¹⁵⁶ and the rights and duties of the parents will be permanently terminated, including the duty of support.¹⁵⁷ Such a provision could be of value in certain cases, but as a general rule parents should be encouraged by legislative action to fulfill their parental obligations, not to avoid them. Action should be taken to enforce parental obligations, even to the extent of imposing criminal sanctions when necessary, and parents should not be able to require the filing of a petition to transfer their support obligations to someone else simply upon their request.

F. Paternity (Chapter 6)

The former statutory provisions concerning paternity actions, or actions concerning children born out of wedlock,¹⁵⁸ are now included in the new juvenile code.¹⁵⁹ Although numerous changes have been made in the provisions, the changes are primarily in matters of form and style. In addition, some changes reflect an effort to distinguish between matters of substance and procedure. For example, the provisions concerning venue¹⁶⁰ have been transferred from the general chapter concerning paternity to the chapter on procedure in juvenile courts.¹⁶¹ Likewise, the provisions concerning the right to demand a

¹⁵⁴NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 500.

¹⁵⁵IND. CODE § 31-6-5-4 (Supp. 1978).

¹⁵⁶*Id.* § 31-6-5-2.

¹⁵⁷*Id.* § 31-6-5-3(2).

¹⁵⁸*Id.* §§ 31-4-1-1 to 33 (1976).

¹⁵⁹*Id.* §§ 31-6-6-1 to 22 (Supp. 1978).

¹⁶⁰*Id.* §§ 31-4-1-8, -10 (1976).

¹⁶¹*Id.* § 31-6-7-7(b) (Supp. 1978).

jury trial,¹⁶² competency of the parties to testify,¹⁶³ and contempt proceedings¹⁶⁴ have been transferred to the procedural chapter. Nevertheless, a few basic changes are reflected in the new code. Thus the provisions concerning the persons who could attend paternity hearings¹⁶⁵ have been transferred to the procedural chapter but have been substantially revised. In the revised form, the court has the discretion to exclude the public from paternity hearings instead of being required to do so.¹⁶⁶ Furthermore, the new code omits the former provision that appeals were to be in accordance with the rules for the appeal of civil cases.¹⁶⁷ As provided in the new code, appeals in juvenile proceedings may be taken "under the Indiana Rules of Trial Procedure, the Indiana Rules of Criminal Procedure, or the Indiana Rules of Appellate Procedure."¹⁶⁸ Finally, the new code also eliminates any change of venue from the county in paternity actions, except that the court has discretion to transfer the case to the county of the child's residence at the mother's request.¹⁶⁹

G. *Procedure in Juvenile Court (Chapter 7)*

1. *Rules of procedure.*—Possibly indicating the extent of the controversy and the importance attached to the issue, the General Assembly finally enacted two separate provisions concerning the rules of procedure to be followed in juvenile courts. The first provision applies the rules of criminal procedure to all delinquency proceedings, including status offenses, and to criminal charges involving adults who are tried in juvenile court. All other juvenile court proceedings are to be governed by the rules of trial procedure (civil rules).¹⁷⁰ A subsequent provision is concerned specifically with the rules of discovery and applies the criminal and civil rules in the same manner to the various types of proceedings.¹⁷¹

Thus the General Assembly purported to resolve the uncertainty that existed under prior statutes despite recent recommendations that specialized rules should be developed for juvenile court proceedings instead of applying the criminal or civil rules as such. For example, the National Advisory Committee concluded: "Many jurisdictions use civil or criminal rules in an attempt to fill these

¹⁶²Compare *id.* § 31-4-1-16 (1976) with *id.* § 31-6-7-10(c) (Supp. 1978).

¹⁶³Compare *id.* § 31-4-1-16 (1976) with *id.* § 31-6-7-13(d) (Supp. 1978).

¹⁶⁴Compare *id.* §§ 31-4-1-20, -24 (1976) with *id.* § 31-6-7-15 (Supp. 1978).

¹⁶⁵*Id.* §§ 31-4-1-8, -16 (1976).

¹⁶⁶*Id.* § 31-6-7-10(b) (Supp. 1978).

¹⁶⁷*Id.* § 31-4-1-18 (1976).

¹⁶⁸*Id.* § 31-6-7-17 (Supp. 1978).

¹⁶⁹*Id.* §§ 31-6-7-7(c), -8(c).

¹⁷⁰*Id.* § 31-6-7-1.

¹⁷¹*Id.* § 31-6-7-11.

procedural gaps. But family court business differs significantly from civil and criminal business, and attempts to apply rules designed for the latter systems to family court processes may result in more confusion than clarity."¹⁷² Hopefully, the new code provisions will help to clarify the nature of juvenile proceedings in Indiana, but difficult questions can still be expected to arise. For example, should the civil rules be applied so as to permit the deposing of the defendant in a paternity action or a parent who is a party to a proceeding to declare his child a child in need of services? Likewise, should a child who is a party to juvenile court proceedings be entitled to see all of the reports and statements obtained from relatives and neighbors during the course of the proceedings? These and similar questions will undoubtedly still have to be resolved by the Indiana appellate courts on a case by case basis.

2. *Waiver of rights.*—During the past ten years, Indiana's appellate courts have developed stringent rules to protect juveniles from improper interrogations by law enforcement officials. Thus a juvenile must be advised of his rights before being interrogated, but his parents must also be advised of his rights and he must have an opportunity for meaningful consultation with his parents before deciding to waive his rights.¹⁷³ The new code now appears to take the final step in protecting a juvenile by providing that the juvenile's rights can be waived only by his parents or attorney.¹⁷⁴ The United States Supreme Court suggested in *In re Gault*¹⁷⁵ that special precautions should be taken to protect juveniles, but it is doubtful that the protections enacted in the new juvenile code were in any way contemplated by the Court. In fact, both of the recent major studies concerning juvenile proceedings recommend special protection for juveniles but conclude that a juvenile may waive his rights under appropriate circumstances.¹⁷⁶

3. *Speedy trial rules.*—Although the federal constitution does not mandate specific time limits in protecting a criminal defendant's right to a speedy trial,¹⁷⁷ provisions for specific time limits have been adopted for both federal¹⁷⁸ and Indiana¹⁷⁹ criminal proceedings.

¹⁷²NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 288. See also JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 55, 62 (Tent. Draft, 1977) (recommends "full and free" discovery in delinquency cases that is essentially similar to criminal discovery but in some respects provides even more discovery than in criminal cases).

¹⁷³Garrett v. State, 351 N.E.2d 30 (Ind. 1976).

¹⁷⁴IND. CODE § 31-6-7-3 (Supp. 1978).

¹⁷⁵387 U.S. 1, 45, 55 (1967).

¹⁷⁶JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO INTERIM STATUS 67 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 212.

¹⁷⁷Barker v. Wingo, 407 U.S. 514, 523 (1972).

¹⁷⁸18 U.S.C. § 3161 (1976).

¹⁷⁹IND. R. CR. P. 4.

The new juvenile code now adopts similar speedy trial rules for delinquency proceedings. No rules are specified for proceedings involving children in need of services, however, apparently because these proceedings are to be considered as essentially civil in nature.

If a child "is in custody," the new code provides that a petition alleging delinquency must be filed within seven days after the child was taken into custody.¹⁸⁰ No similar provision is included in the Indiana Rules of Criminal Procedure for the filing of an indictment or information, and the meaning of the juvenile provision itself is unclear. The provision may be interpreted to mean that a petition must be filed within seven days if a juvenile has been taken into custody and is still being detained in a detention center. If this interpretation is correct, then the code does not include any time limit for the filing of a delinquency petition after a child has been taken into custody and then promptly released to his parents. In such case, the only limitation would be the subsequent provision that a juvenile cannot be held to answer a delinquency charge for more than one year, apparently from the date that he was taken into custody and then released.¹⁸¹ This ambiguity arises because the word "custody" appears twice in the provision, possibly having different meanings for each usage, and should be clarified by an amendment to the provision.

The code also provides time limits for the holding of fact-finding and waiver hearings, and the time limits vary depending on whether the child is or is not in custody.¹⁸² Finally, the code provides that a child may not be held, presumably in custody, for more than six months in the "aggregate" pending an adjudication¹⁸³ and may not be held to answer a charge for more than one year in the "aggregate," presumably when not in custody.¹⁸⁴ These provisions appear to reflect the basic time limits included in the criminal rules, but their effect is uncertain because of the other provisions which prescribe specific time limits for the various hearings, as noted above. These provisions need to be revised to clarify the manner in which the time limits interrelate.

One other provision in the speedy trial rules makes a major change in the prior law and appears to be in conflict with the related provisions in Criminal Rule 4. Under the prior law, a

¹⁸⁰IND. CODE § 31-6-7-6(a) (Supp. 1978).

¹⁸¹*Id.* § 31-6-7-6(f). This section does not refer to a starting date for the one year period, but it follows immediately after a provision for a six month period which does refer to the time the juvenile was taken into custody.

¹⁸²*Id.* § 31-6-7-6(b), (c).

¹⁸³*Id.* § 31-6-7-6(e).

¹⁸⁴*Id.* § 31-6-7-6(f).

juvenile who was waived to the criminal court was then subject to the provisions of Criminal Rule 4. According to that rule, the juvenile would then have to be brought to trial within six months or a year from the date that an indictment or information was filed against him in the criminal court, depending on whether he was kept in custody pending the trial. Criminal Rule 4 does not prescribe any time limit for the filing of a formal charge, however, and thus a juvenile could apparently be detained in custody for an indefinite period of time pending the filing of the formal charge. In *State v. Roberts*,¹⁸⁵ the Indiana Court of Appeals concluded that Criminal Rule 4 should be construed to require the filing of a formal charge in the criminal court within a reasonable period of time after a waiver order and found a fifty day delay to be unreasonable. The new code purports to resolve the problem in a different manner by providing that "the computation of time under Criminal Rule 4 commences on the date of the waiver order."¹⁸⁶ Such a provision would be contrary to the provisions of Criminal Rule 4 which provides that the time limits run from the date that a charge is filed or from the date that the defendant is arrested, whichever is later. Thus the statutory provision would apparently be invalid unless the Indiana Supreme Court would decide to adopt it as a procedural rule.¹⁸⁷

4. *Change of venue and change of judge.*—As noted previously, the venue provisions are included in the procedural chapter despite the controversy over whether they are in fact substantive or procedural. The new provisions make a distinct change in the law concerning juvenile proceedings by providing that proceedings concerning delinquent children or children in need of services may be commenced in the county where the child resides or in the county where the act occurred.¹⁸⁸ Under the prior law, the proceedings could be commenced only in the county where the child resided or was found.¹⁸⁹ Furthermore, the new code changes the prior law concerning change of venue from the county¹⁹⁰ by providing that there is to be no change of venue from the county except that the court has discretion to transfer the case to the county of the child's residence.¹⁹¹ Finally, the code provides that a change of judge may be obtained only upon a showing of good cause.¹⁹² This provision ap-

¹⁸⁵358 N.E.2d 181 (Ind. Ct. App. 1976).

¹⁸⁶IND. CODE § 31-6-7-6(d) (Supp. 1978).

¹⁸⁷See *Neeley v. State*, 261 Ind. 434, 305 N.E.2d 434 (1974).

¹⁸⁸IND. CODE § 31-6-7-7(a) (Supp. 1978).

¹⁸⁹*Id.* § 31-5-7-8 (1976).

¹⁹⁰See *State ex rel. Dunn v. Lake Juvenile Court*, 248 Ind. 324, 228 N.E.2d 16 (1967).

¹⁹¹IND. CODE §§ 31-6-7-7(c), -8(a) (Supp. 1978).

¹⁹²*Id.* § 31-6-7-9.

parently applies to all proceedings in the juvenile court and is one of the most significant changes¹⁹³ in the entire code since the automatic change of judge rule has been a longstanding general practice in Indiana in both civil¹⁹⁴ and criminal¹⁹⁵ cases.

5. *Public hearings, juries, and burden of proof.*—The new code continues to give the juvenile court judge the discretion to determine whether the public should be admitted to juvenile proceedings¹⁹⁶ despite recent recommendations that delinquency proceedings should be open to the public.¹⁹⁷ Likewise, the code continues to provide that juvenile proceedings are generally to be tried by the court¹⁹⁸ even though some sentiment has developed that juveniles charged with delinquency should have the right to request a jury trial.¹⁹⁹ The new code does contain one questionable provision concerning juvenile court trials, however. It provides that adults who are tried in juvenile court on criminal charges are to be tried by the court unless they request a jury trial.²⁰⁰ This provision appears to be contrary to the conclusion of the Indiana Supreme Court in *State ex rel. Rose v. Hoffman*,²⁰¹ a case involving an adult tried in juvenile court for contributing to the delinquency of a minor. In that decision, the court concluded that the Indiana constitution requires a judge in a criminal case "to assume that a defendant will want a jury trial."²⁰² Finally, the code purports to change the prior law by providing that an adjudication of delinquency based on a status offense must be based on proof beyond a reasonable doubt.²⁰³ Since the provision is contrary to a decision of the Indiana Supreme Court,²⁰⁴ its effect will be in doubt until the court either adopts the provision or finds that it relates to a matter of substance rather than procedure.²⁰⁵

¹⁹³See *State ex rel. Duffy v. Lake Juvenile Court*, 238 Ind. 404, 151 N.E.2d 293 (1958).

¹⁹⁴IND. R. TR. P. 76.

¹⁹⁵IND. R. CR. P. 12.

¹⁹⁶Compare IND. CODE § 31-6-7-10(b) (Supp. 1978) with *id.* § 31-5-7-15 (1976).

¹⁹⁷See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO ADJUDICATION 70 (Tent. Draft, 1977); NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 420.

¹⁹⁸Compare IND. CODE § 31-6-7-10(c) (Supp. 1978) with *id.* § 31-5-7-15 (1976). See *Bible v. State*, 253 Ind. 373, 254 N.E.2d 319 (1970).

¹⁹⁹See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO ADJUDICATION 52. But see NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 420.

²⁰⁰IND. CODE § 31-6-7-10(c) (Supp. 1978).

²⁰¹227 Ind. 256, 85 N.E.2d 486 (1949).

²⁰²*Jd.* at 262, 85 N.E.2d at 488. See also *Kindle v. State*, 161 Ind. App. 14, 20, 313 N.E.2d 721, 725 (1974).

²⁰³IND. CODE § 31-6-7-13(a) (Supp. 1978).

²⁰⁴*Warner v. State*, 254 Ind. 209, 258 N.E.2d 860 (1970).

²⁰⁵See *Neeley v. State*, 261 Ind. 434, 305 N.E.2d 434 (1974). The General Assembly

6. *Examinations of a juvenile.*—Under the prior juvenile statutes, a court could require a juvenile to be examined by a physician, psychiatrist, or psychologist for the purpose of providing needed medical, surgical, or psychiatric care or to determine if the juvenile should be committed because of a mental defect or disorder.²⁰⁶ The new code contains a revised version of this provision and authorizes medical, psychological, psychiatric, social, or educational examinations to determine if a petition should be filed or to provide information necessary for a fact-finding hearing.²⁰⁷ In this revised form it is doubtful if the provision is constitutionally valid, at least with reference to juveniles charged with an act of delinquency, especially since the provision would permit the juvenile to be placed in temporary confinement for fourteen days in order to complete the examinations.²⁰⁸

A juvenile is entitled to the privilege against self-incrimination, at least in delinquency proceedings in which the juvenile is charged with an act that would be a crime if committed by an adult.²⁰⁹ Therefore, it appears that a juvenile so charged could not be examined for the purpose of obtaining information to be used at the fact-finding hearing. It is even doubtful if such a juvenile could be subjected to "social or educational" examinations to determine if a petition should be filed. Possibly the provision could be valid to the extent that it would authorize examinations to determine mental competency to participate in the juvenile proceedings,²¹⁰ but the provision appears to need a substantial revision in order to eliminate the constitutional questions concerning it.

7. *Appeals.*—The procedural chapter concludes with the statement that appeals may be taken from any final order of the court under the civil rules, criminal rules, or appellate rules.²¹¹ No guidance is given concerning the definition of a final order or the types of proceedings to which the various rules apply. In particular, the code does not decide whether a waiver order is a final, appealable order or an order which cannot be appealed until after a conviction in the criminal court.²¹²

apparently considers the burden of proof to be a matter of procedure since it placed this provision in the procedural chapter of the code.

²⁰⁶IND. CODE § 31-5-7-21 (1976).

²⁰⁷*Id.* § 31-6-7-12(a) (Supp. 1978).

²⁰⁸*Id.* § 31-6-7-12(c).

²⁰⁹*In re Gault*, 387 U.S. 1 (1967).

²¹⁰See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO INTERIM STATUS 61; NATIONAL ADVISORY COMMITTEE, *supra* note 24, at 468.

²¹¹IND. CODE § 31-6-7-17 (Supp. 1978).

²¹²See JUVENILE JUSTICE PROJECT, *supra* note 22, STANDARDS RELATING TO TRANSFER BETWEEN COURTS 49 (Tent. Draft, 1977) (recommends that an appeal be authorized within seven court days after a waiver is ordered).

H. Juvenile Records (Chapter 8)

Juvenile records continue to be confidential records under the code which contains specific provisions concerning the persons authorized to inspect such records and the procedures by which confidentiality is to be maintained.²¹³ The code also includes a simplified expungement procedure by which any person may petition the juvenile court at any time to expunge records pertaining to his involvement in juvenile court proceedings. The court is given broad discretion to grant the order and may order the records to be destroyed or given to the person to whom they pertain.²¹⁴

I. Juvenile Court Administrative Provisions (Chapter 9)

The code contains a number of administrative provisions which authorize juvenile courts to appoint referees, reporters, and probation officers, to establish detention and shelter care facilities, and to assess certain court costs.²¹⁵

J. Interstate Compact on Juveniles (Chapter 10)

The juvenile code concludes with a reenactment of the interstate compact on juveniles²¹⁶ which was originally adopted by the General Assembly in 1957.²¹⁷ Three new amendments have also been added to the compact, including provisions for the return of runaways, the return of juveniles charged with delinquency based on criminal acts, and the confinement of a juvenile in another state.²¹⁸

K. Conclusion

The Indiana General Assembly has taken the initial step toward giving the state its first major revision of the juvenile code in over thirty years. Two additional steps need to be taken, however, by the General Assembly and the Indiana Supreme Court before the new code becomes effective on October 1, 1979. Assuming that the code is not repealed in the next legislative session, the General Assembly needs to clarify certain provisions, reconsider other provisions, and consider adding additional provisions to the code. At the same time, the supreme court will have to adopt the procedural provisions of

²¹³IND. CODE § 31-6-8-1 (Supp. 1978).

²¹⁴*Id.* § 31-6-8-2.

²¹⁵*Id.* §§ 31-6-9-1 to 6.

²¹⁶*Id.* §§ 31-6-10-1 to 4.

²¹⁷Interstate Compact on Juveniles, ch. 98, 1957 Ind. Acts 156 (codified at IND. CODE § 31-5-3-1 (1976)).

²¹⁸IND. CODE § 31-6-10-1 (Supp. 1978). By a separate statute, the 1978 General Assembly also enacted the Interstate Compact on the Placement of Children, Pub. L. No. 72, 1978 Ind. Acts 955 (codified at IND. CODE § 12-3-1-1 (Supp. 1978)).

the code as court rules or the effect of much of the code will be left in doubt for some time to come.²¹⁹

If the code does become effective, it will make a number of substantial changes in the state's juvenile justice system. Some of the more significant changes relate to the role of the prosecuting attorney, the codification of informal adjustment procedures, the clarification and revision of the investigation and petition procedures, the new rules concerning change of judge and change of venue, and the new emphasis on the participation of parents in the adjudicatory and dispositional phases of the proceedings. At the same time, the code contains certain other changes that the General Assembly should seriously reconsider. These include the provisions concerning emancipation of a juvenile, termination of the parent-child relationship, time limits on the adjudicatory process, and review of dispositional orders. In addition, the General Assembly should clarify the provisions concerning the definitions of delinquency and children in need of services, the rules of procedure to be followed in the various proceedings, and the inconsistent positions taken with regard to murder and waiver. Finally, action should be taken to add provisions that were omitted from the code, including provisions concerning dependency, the release of juveniles on bail, the insanity defense in juvenile proceedings, and appellate procedures with particular reference to the appeal of waiver orders and the rules to be followed on appeals.

Although this codification is referred to as the "juvenile code,"²²⁰ the term is not used in the statute. The term was used, however, in the statute which originally established the juvenile justice division of the judicial study commission and authorized it to "study and make recommendations for changes in the present substantive juvenile code."²²¹ Assuming that the term will continue to be used, it is necessary to recognize that the code does not include all of the state's statutory provisions concerning juveniles. Provisions concerning child support,²²² child welfare,²²³ truancy,²²⁴ and adoption²²⁵ are still included in other titles or sections of the Indiana general

²¹⁹See Neeley v. State, 261 Ind. 434, 305 N.E.2d 434 (1974).

²²⁰The Juvenile Justice Division, which proposed the changes in the law, entitled its proposal "Indiana Juvenile Code."

²²¹Act of Apr. 30, 1975, Pub. L. No. 2, § 3, 1975 Ind. Acts 2, 5 (codified at IND. CODE § 2-5-8-4(7) (1976) (amended 1978)). When the 1978 General Assembly decided to continue the work of the juvenile justice division, it amended this provision and substituted the term "juvenile law" for "juvenile code." Act of Mar. 9, 1978, Pub. L. No. 6, § 2, 1978 Ind. Acts 638, 639.

²²²IND. CODE §§ 12-1-6.1-1 to 20 (1976).

²²³Id. §§ 12-1-7-1 to 50.

²²⁴Id. §§ 20-8.1-3-1 to 37.

²²⁵Id. §§ 31-3-1-1 to 12.

statutes. The General Assembly will undoubtedly need to consider each of these areas carefully in order to decide what, if any, revisions are needed and whether any of the provisions should be included in the new code.

II. Administrative Law

*Gary P. Price**

A. Administrative Fact-Finding

In last year's administrative law Survey discussion, the author outlined *V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc.*,¹ which elaborated on fact-finding requirements for administrative agencies.² As noted by the author, *V.I.P. Limousine* demanded that the agency fact-finder state not only the ultimate facts upon which conclusions are based, but also the basic facts necessary to support the ultimate facts and conclusions thereon. In addition, the court stated that situations may arise in which the agency must go beyond fact-finding, and give a statement of reasons for the factual determination.³

Once again, the Indiana Court of Appeals has seen fit to elaborate on what exactly will be required of agency fact-finders. In *Wolfe v. Review Board of the Indiana Employment Security Division*,⁴ the appellant challenged a denial of unemployment compensation by the Review Board, alleging *inter alia* that the Board "failed to make findings relative to each of the reasons he gave for leaving."⁵ The appellant had raised eight specific grounds which he claimed constituted good cause for voluntarily leaving his employment. Although the Board had made findings specifically disposing of a number of appellant's claims, it was silent with respect to other allegations raised. The posture of the court of appeals, in responding to appellant's challenge and remanding for further findings on the issues not addressed by the Board, illustrates the clearest statement

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¹355 N.E.2d 441 (Ind. Ct. App. 1976).

²See Utken, *Administrative Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20, 22 (1977).

³355 N.E.2d at 445.

⁴375 N.E.2d 652 (Ind. Ct. App. 1978).

⁵*Id.* at 653.

to date of the appellate review standards regarding agency decision-making.

The court first noted that it would be bound by the Board's decisions on questions of fact, but stated that the issue in the instant case was a failure of the agency to decide all the facts. Citing *Cole v. Sheehan Construction Co.*,⁶ an Indiana Supreme Court decision on the same question, the court of appeals held that, so long as the claimant has properly preserved error,⁷ the reviewing court "no longer may affirm by merely determining whether there was some evidence to support an award."⁸

Next, the court of appeals stressed the need for specific findings by an administrative board, citing *Transport Motor Express, Inc. v. Smith*⁹ for the proposition that administrative appeals must focus on the sufficiency of the facts *found*, rather than the sufficiency of the evidence used to establish the facts. In language that portrayed a certain degree of perverseness, the court opined:

Perhaps it is still the case that review boards do not know how to make specific findings. But, we believe that it is time the administrative boards learned. A finding of fact "must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law."¹⁰

Finally, the court added a constitutional dimension to its decision by noting that the procedural due process provisions of *Goldberg v. Kelly*¹¹ require, at a minimum, a statement of the reasons for an agency decision and some indication of the evidence upon which the agency relied in arriving at that decision.¹² The court found the rationale of *Goldberg* particularly apropos to the case at bar. An individual who is denied statutory benefits, after asserting that he fulfills the requirements for those benefits, should be informed with particularity of all the material facts that led to the

⁶222 Ind. 274, 53 N.E.2d 172 (1944), cited in *Wolfe v. Review Bd. of the Ind. Employment Security Div.*, 375 N.E.2d at 654-55.

⁷The claimant must frame his appeal as being contrary to law.

⁸375 N.E.2d at 655.

⁹289 N.E.2d 737 (Ind. Ct. App. 1972), vacated on other grounds, 262 Ind. 41, 311 N.E.2d 424 (1974), cited in *Wolfe v. Review Bd. of the Ind. Employment Security Div.*, 375 N.E.2d at 655.

¹⁰375 N.E.2d at 655-56 (citing *Whispering Pines Home for Senior Citizens v. Nicalek*, 333 N.E.2d 324 (Ind. Ct. App. 1975)).

¹¹397 U.S. 254 (1970), cited in *Wolfe v. Review Bd. of the Ind. Employment Security Div.*, 375 N.E.2d at 656.

¹²375 N.E.2d at 656.

denial. This requirement includes, at a minimum, a specific finding disposing of *each* material issue presented by a claimant, not findings on three of eight, or negative findings on some, but not all, of the material issues presented.¹³

The *Wolfe* decision represents an important development in administrative law for a number of reasons. First, it advocates protection of the claimant or aggrieved party in an agency hearing; the individual is often unrepresented by counsel and his real and substantial interests may be overshadowed by the inexorable process of the administrative machinery. Second, *Wolfe* sends a definite signal to agency review boards, requiring them to take an "active role" in ferreting out evidence sufficient to establish *all* the facts necessary to support a decision granting, or denying, benefits to a claimant. Last, but most important for the practitioner, the case indicates the standards agency decision-making must fulfill, and points out the framework for appeal of an adverse agency decision.¹⁴

B. *Estoppel*

*Middleton Motors, Inc. v. Indiana Department of State Revenue*¹⁵ illustrates that the "king's men,"¹⁶ as well as the private citizen, will sometimes be held accountable for words and actions which induce reliance on the part of another. In *Middleton*, the taxpayer had made arrangements to pay back taxes in installments and, at the same time, had been told by the deputy director, second in command at the Department of Revenue, that he had two years to sue for a refund of the contested taxes. This informal agreement was not honored, however, when the taxpayer later filed suit seeking a refund of the taxes paid after the state had denied his claim.

The state argued that the controversy was controlled by a statute¹⁷ which precluded judicial jurisdiction of a refund suit if the complaint was not filed within "three (3) months" after notification of an adverse ruling by the Department of Revenue. Obviously, the three-month limitation of the statute was considerably different from the two-year period stated by the deputy director in his

¹³*Id.*

¹⁴*Cf. Zehner v. Indiana State Alcoholic Beverage Comm'n*, 364 N.E.2d 1037 (Ind. Ct. App. 1977) (challenge of findings waived on appeal if not included in motion to correct errors pursuant to IND. R. TR. P. 59).

¹⁵366 N.E.2d 226 (Ind. Ct. App. 1977), *rev'd*, No. 978 S 192 (Ind. Sept. 14, 1978).

¹⁶See *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972). In severely limiting the defense of sovereign immunity, the *Campbell* court noted that the doctrine originated from the early common law principle that "the king could do no wrong." *Id.* at 57, 284 N.E.2d at 734.

¹⁷IND. CODE § 6-2-1-19 (1976).

negotiations with the taxpayer. Basing its decision on the statutory terms, the trial court granted the state's motion to dismiss.

The court of appeals reversed the decision of the trial court, holding that the doctrine of estoppel would apply to acts of a governmental unit, whether those acts be of a proprietary or governmental character.¹⁸ The court premised this conclusion on the decision of the Indiana Supreme Court in *Campbell v. State*.¹⁹

Prior to *Campbell*, the doctrine of sovereign immunity protected the state from liability for those acts which involved governmental functions as compared to proprietary functions.²⁰ Noting that the distinction between governmental and proprietary functions has never been clearly defined, the *Campbell* court eliminated the distinction and concluded that the doctrine will be inapplicable where there has "been a breach of duty owed to a private individual" by the state.²¹ The *Middleton Motors* court, therefore, concluded: "[T]he State must be held to the same standards as private citizens when dealing with other parties . . ."²² The court reasoned that this standard would require the application of the estoppel doctrine, if the trier of fact found all the elements to be present,²³ since the state's claim of immunity from estoppel was simply an "offshoot" of sovereign immunity.²⁴

The supreme court, however, adopted a much narrower view of the issues involved and vacated the decision of the court of appeals.²⁵ The supreme court found that nothing in the briefs or pleadings filed by the Department of Revenue indicated that its defense to the estoppel issue emanated "from the defense of sovereign immunity."²⁶ Instead, the defense to Middleton's estoppel

¹⁸366 N.E.2d at 228.

¹⁹259 Ind. 55, 284 N.E.2d 733 (1972), cited in *Middleton Motors, Inc. v. Indiana Dep't of State Revenue*, 366 N.E.2d at 228.

²⁰See *Perkins v. State*, 252 Ind. 549, 251 N.E.2d 30 (1969), discussed and limited in *Campbell v. State*, 259 Ind. at 60, 284 N.E.2d at 736.

²¹259 Ind. at 63, 284 N.E.2d at 737.

²²366 N.E.2d at 228.

²³The court of appeals listed the elements as follows:

" '(1) A representation or concealment of material facts; (2) The representation must have been made with knowledge of the facts; (3) The party to whom it was made must have been ignorant of the matter; (4) It must have been made with the intention that the other party should act upon it; (5) The other party must have been induced to act upon it.' "

Id. (quoting *State ex rel. Crooke v. Lugar*, 354 N.E.2d 755, 766 (Ind. Ct. App. 1976) (quoting *Emmco Ins. v. Pashas*, 140 Ind. App. 544, 551, 224 N.E.2d 314, 318 (1966))).

²⁴366 N.E.2d at 228.

²⁵No. 978 S 192 (Ind. Sept. 14, 1978) (Givan, C.J., Pivarnik & Prentice, J.J., concurring; DeBruler, J., dissenting with opinion, Hunter J., concurring in dissent).

²⁶*Id.*, slip op. at 3.

argument was traced to the express language of Indiana Code section 6-2-1-19,²⁷ which established a statutory condition precedent to the right to bring a civil action in refund cases. Hence, the use of sovereign immunity as a defense to an assertion of estoppel was considered to be not fairly raised by the record, and was not treated in a substantive manner by the supreme court.

However, the supreme court, in holding that the court of appeals "erred in its application of estoppel to the facts herein,"²⁸ appeared to engage in an analysis of merits of the estoppel defense. According to the court, legislative enactments which establish conditions precedent to the exercise of a right or remedy can never be circumvented by the unauthorized acts of government officers or employees.²⁹ Further, the decision noted that all persons are charged with knowledge of rights and remedies prescribed by statute³⁰ and concluded that the taxpayer's reliance on the representations of the deputy director was unjustifiable.³¹

The issues left unresolved by *Middleton Motors* should be noted. First, it is unclear what position the supreme court would adopt if the issue of estoppel, and the state's ability to avoid the estoppel doctrine as a variant of its sovereign immunity, were raised by the record. Presumably, under the court's ruling in *Campbell*, the state's power to ignore the estoppel challenge would be abrogated by the demise of sovereign immunity. Second, the court looked to the facts of the case and relied, to a certain extent, on the adage that ignorance of the law is no excuse. One might conclude, therefore, that representations by the state of material facts peculiarly within the ambit of the governmental entity and *not* found in statutes equally accessible to all parties involved will present the factual context necessary for the invocation of estoppel against the state or its subdivisions.

²⁷IND. CODE § 6-2-1-19 (1976) states, in pertinent part:

That except as hereinafter provided, no court shall have jurisdiction over any such suit unless the taxpayer shall show that the complaint therein was filed within three [3] months after he shall have received notification of the action of the department denying said petition for refund in whole or in part. In the event that the department shall take no action upon such petition for refund within six [6] months after the same shall have been filed, the taxpayer may elect to institute such suit for refund at any time thereafter, but not more than three [3] months after such claim shall have been denied in whole or in part, in no event more than three [3] years from the date of the filing of the claim for refund.

²⁸No. 978 S 192, slip op. at 3.

²⁹*Id.* (citing *Walgreen Co. v. Gross Income Tax Div.*, 225 Ind. 418, 75 N.E.2d 784 (1947)).

³⁰No. 978 S 192, slip op. at 3-4 (citing *City of Evansville v. Follis*, 315 N.E.2d 724 (Ind. Ct. App. 1974)).

³¹No. 978 S 192, slip op. at 4.

C. The Delegation Doctrine

A general principle of administrative law well known to both the student and the practitioner is the delegation, or rather the nondelegation, doctrine. Simply stated, the doctrine states that no legislative body may delegate to an administrative agency the legislative powers inherent to that body unless authorized by relevant constitutional provisions.³² The theoretical underpinnings of the doctrine were based upon a fear that legislative powers would be displaced by the administrator, that the separation of powers would be diluted, or that the traditional democratic process would be supplanted by administrative fiat.³³ This doctrine, although a senior citizen of administrative law theory, was the focus of analysis in a recent Indiana decision.

*Indiana University v. Hartwell*³⁴ involved an appeal of an award of damages pursuant to a decision of the Human Rights Commission of the City of Bloomington. One of the issues raised³⁵ challenged the authority of the Commission to award damages under the terms of the pertinent enabling statute.³⁶ The court of appeals agreed with the cross-appellants (*Hartwell, et al.*) that the statute did grant the authority to award money damages, but left the cross-appellants with a Pyrrhic victory since it also determined that the language providing for such powers³⁷ went far beyond the range of delegable authority and violated the terms of the Indiana Constitution.³⁸

The court of appeals stated that the natural sense of the words utilized in the statute leads "inescapably" to the conclusion:

[T]he legislature has, unwittingly or not, arrayed the full panorama of powers of the State and has given any city,

³²See, e.g., *State ex rel. Standard Oil Co. v. Review Bd. of the Ind. Employment Security Div.*, 230 Ind. 1, 101 N.E.2d 60 (1951). See generally 1 AM. JUR. 2d *Administrative Law*, §§ 100-37 (1962); K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 2.06 (3d ed. 1972).

³³See authorities cited in note 32 *supra*.

³⁴367 N.E.2d 1090 (Ind. Ct. App. 1977).

³⁵Other issues raised in the case, and the legislature's response thereto, are discussed in *Constitutional Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 69, 69-71 (1978).

³⁶IND. CODE § 22-9-1-12 (1976) (repealed 1978; re-enacted Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1120 (codified at IND. CODE § 22-9-1-12.1 (Supp. 1978))).

³⁷IND. CODE § 22-9-1-12 (1976) read, in pertinent part, as follows:

An ordinance enacted as provided in this section may impose penalties or grant such powers to the local commission agency as may be deemed necessary or appropriate to implement its purpose and objective, whether or not such powers are granted to the state commission under section 2 of this chapter including, but not limited to

³⁸367 N.E.2d at 1093 (citing IND. CONST. art. 3, § 1; art. 4, § 1; art. 5, § 1; art. 7, § 1).

town, or county uncontrolled discretion to select in smorgasbord fashion those powers "deemed necessary and appropriate" to implement the purpose and objective of the Civil Rights Act and to vest a local commission agency with such selected powers.³⁹

The logic expressed by the court was that, although it was highly *improbable* that a governmental sub-unit would grant "the full panorama" of powers to a commission formed pursuant to the statute, it was clearly *possible* for a sub-unit to be invested with powers equal to or greater than the state itself, a legally impermissible result. Finding that no saving construction was possible, the court declared the statute unconstitutional and vacated the Commission award of damages which instigated the appeal.

The *Hartwell* decision is important not so much for what it does, since application of the nondelegation doctrine is a mainstay of state administrative law. *Hartwell* is important, nevertheless, because the decision, as the most recent pronouncement of Indiana law, steadfastly refused to adopt the so called "modern" approaches to the delegation problem in the administrative framework, approaches which have abandoned the clinical examination of statutory enactments in *vacuo*, and focused instead on the effect of the particular statute *as applied*. One author characterizes this shift as a requirement of administrative standards and argues that the nondelegation doctrine should not be applied until, and unless, the administrator fails to provide adequate procedural safeguards to the potentially defective statute.⁴⁰ The net result of *Hartwell* is a reaffirmation of traditional nondelegation theory in Indiana. The practitioner should also note that careful examination of the text of enabling statutes will often yield legal support in a challenge of an agency decision.

D. Administrative Duty—*Mandamus*

The principle that an administrative agency, or an official within such an agency, must perform those duties which statutory authorities require is clearly established.⁴¹ When an administrative

³⁹367 N.E.2d at 1093.

⁴⁰See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.00, at 20 (1976). See also White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (holding due process requires administrator of state welfare funds to implement written standards governing disbursement).

⁴¹See, e.g., *Fromuth v. State*, 367 N.E.2d 29 (Ind. Ct. App. 1977). *Fromuth* held that the State Personnel Director had a legal duty to follow and implement the decision of the Indiana State Employees Appeals Commission by virtue of IND. CODE § 4-15-2-35 (1976) which provided, in pertinent part: "[T]he appointing authority shall follow the recommendation of the commission" (emphasis added). 367 N.E.2d at 34. See

agency or official does not perform a duty which the law requires, the appropriate remedy is an action for mandate pursuant to Indiana Code sections 34-1-58-1 to 2.⁴²

*Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*⁴³ held that, in addition to a court order compelling the agency or official to do what the law requires, an award of damages may be properly included in the appropriate circumstances. The court of appeals, citing Indiana Code section 34-1-58-4⁴⁴ and relying upon *State ex rel. Cheeks v. Wirt*,⁴⁵ held that the statutory language authorizing damages "as in actions for false returns" was illustrative rather than restrictive and would support an award of damages in conjunction with the appropriate equitable relief for failure to perform a statutory duty.⁴⁶

On grant of transfer, however, the Indiana Supreme Court recast the decision of the court of appeals.⁴⁷ The supreme court, recognizing that the relevant statutory language "has never been fully considered by this Court,"⁴⁸ undertook a clarification of the damages aspect of a mandamus action.

also *Grenchik v. State ex rel. Pavlo*, 373 N.E.2d 189, 191 (Ind. Ct. App. 1978) (holding a municipality to be mere creature of the state and requiring conformance of its acts to statutory pronouncements); *Indiana State Highway Comm'r v. Zehner*, 366 N.E.2d 697, 701-02 (Ind. Ct. App. 1977) (ordering administrative bodies to perform discretionary acts if the bodies have abused their discretion, or have refused to use their discretion at all; holding that Indiana State Highway Commission must make "expeditious" determination of condemnation claim wrongfully delayed).

⁴²IND. CODE § 34-1-58-1 (1976) provides as follows:

Writs of mandate in the circuit and superior courts of this state are hereby abolished, and the causes of action heretofore remedied by means of such writs shall hereafter exist and be remedied by means of complaint and summons in the name of the state on relation of the party in interest, in the circuit, superior and probate courts of this state, as other civil actions, and shall be known as actions for mandate. Writs of mandate and prohibition may issue out of the Supreme and Appellate Courts of this state in aid of the appellate powers and functions of said courts respectively.

Id. § 34-1-58-2 (1976) provides as follows: "The action for mandate may be prosecuted against any inferior tribunal, corporation, public or corporate officer or person to compel the performance of any act which the law specifically enjoins, or any duty resulting from any office, trust or station."

⁴³365 N.E.2d 1225 (Ind. Ct. App. 1977), *rev'd*, 379 N.E.2d 140 (Ind. 1978).

"IND. CODE § 35-1-58-4 (1976), cited in *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 365 N.E.2d at 1230. The statute provides, in pertinent part: "The court shall grant plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns"

⁴⁵203 Ind. 121, 177 N.E. 441 (1931), relied upon in *Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 365 N.E.2d at 1230.

⁴⁶365 N.E.2d at 1231.

⁴⁷379 N.E.2d 140 (Ind. 1978).

⁴⁸*Id.* at 143.

The supreme court engaged in an extensive and well-reasoned chronological exegesis of the damages aspect of the mandamus remedy. The court quoted a predecessor version of the relevant statute⁴⁹ and concluded that the evolution of our present statute was designed in part to consolidate the right of action for a false return with the mandamus proceeding itself.⁵⁰ The court reasoned that the language preserved by the legislature in the contemporary counterpart statute—"as in actions for false returns"—was intended to preserve the common law need to show proof of false return.⁵¹ In view of the fact that mandamus now proceeds through the summons, pleading of complaint, and answer, the court concluded: "[T]he Legislature intended to permit the successful plaintiff to recover damages if he is required to make proof on issues of fact in order to obtain a judgment compelling a defendant officer or body to comply with the law."⁵²

The court then held that the "subjection of the plaintiff to the rigors, vexation and expense of trial" forms the basis of the award of damages, and the successful plaintiff is entitled to compensation for "all injuries flowing as a natural and probable consequence of the subjection to such trials."⁵³ It is apparent that the supreme court has, indeed, clarified the damages aspect of the mandamus remedy. It is equally clear that the prospect of compensatory liability, upon proper proof by a successful plaintiff in a mandamus action, should induce a more responsive attitude on the part of the agency or official who is petitioned to do something which the law clearly requires. Thus, for the practitioner litigating a mandamus action, proof of damages resulting from the necessity of trial should be a standard component of plaintiff's case in chief.⁵⁴

E. Procedural Due Process

A relatively recent development in administrative law involves the application of procedural due process, e.g., the right to notice

⁴⁹The quoted portion is as follows:

In case a verdict shall be found for the plaintiff where the writ is in the alternative, or if judgment is given for him, he shall recover damages as in an action for a false return, against the party making the return, and a peremptory writ shall be granted without delay.

Act of Apr. 7, 1881, ch. 38, § 808, 1881 Ind. Acts 380, *quoted in Indiana Alcoholic Beverage Comm'n v. State ex rel. Harmon*, 379 N.E.2d at 143.

⁵⁰379 N.E.2d at 143.

⁵¹*Id.* at 144.

⁵²*Id.*

⁵³*Id.*

⁵⁴Given the rather murky history of damages in mandamus actions, the clarifying decision of the supreme court has, in essence, revitalized this remedial device and given the practitioner a powerful tool for both trial and negotiation.

and an opportunity to be heard, in those cases in which state action infringes upon alleged liberty or property interests.⁵⁵ The procedural due process theory has become embedded in the framework of the administrative appeal, and two cases decided during the survey period indicate the circumstances under which an argument for procedural due process will, or will not, receive a favorable reception in the appellate courts of Indiana.

In *Gardner v. Tally*,⁵⁶ the appellant challenged his dismissal from the Indiana State Highway Commission, claiming a constitutional right to a due process hearing prior to termination. The court of appeals rejected this contention, finding on the basis of a two-pronged test that the statute controlling appellant's employment neither expressly authorized a pre-termination hearing, nor created a property interest entitled to constitutional protections.⁵⁷

⁵⁵See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

⁵⁶373 N.E.2d 175 (Ind. Ct. App. 1978).

⁵⁷*Id.* at 177. The relevant statutes are as follows: IND. CODE § 8-13-1.5-5 (1976) (limitation of number of employees of same political affiliation):

The highway commission shall not have more than sixty per cent (60%) of the employees covered by this chapter (8-13-1.5-1 to 8-13-1.5-8) in each pay classification, and insofar as practicable, as adherents to any one (1) political party. To meet the requirements of this section, the Commission is hereby authorized to discharge at least twenty per cent (20%) of all employees employed under the provisions of this chapter at the beginning of each Governor's administration. If, in the opinion of the Commission, rehiring of discharged employees is in the best interest of the Commission, such employees may be reinstated. Employees that are retained or employed under the provisions of this chapter may be dismissed, demoted, suspended or laid off because of their political affiliation in order to achieve the political balance require by this chapter. It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity.

Id. § 8-13-1.5-6 (dismissal of employees for cause):

Any employee may be dismissed, demoted, suspended or laid off for cause. For the purpose of this chapter (8-13-1.5-1 to 8-13-1.5-8) *cause shall be* any action or inaction of any employee that produces, incurs or results in the substantial diminution of the employee's ability or willingness to perform his duties, impairs the ability or willingness of any other employee of the institution or agency of state government to perform his duties or brings discredit upon the State of Indiana. *Cause may include but shall not be limited to* the following: intoxication on the job; physical or mental inability to perform the job requirements; personality characteristics which substantially limit the employee's or his fellow employee's ability to perform his duties, or which severely handicap the administration of the commission; and, action or inaction which severely limits or prohibits the implementation of administrative policies.

(emphasis added).

The court first found that the terms of the Indiana State Highway Commission—Bi-Partisan Personnel System⁵⁸ “specifically limits an employee’s expectation of continued employment to the term of the office of the governor of Indiana.”⁵⁹ In addition, the statutory provision dealing with dismissal “for cause” defined the term in an extremely open-ended manner. The court, therefore, concluded: “The specificity demonstrated in other Acts is conspicuously lacking in the Bipartisan Personnel Act . . .”⁶⁰ and held that no property interest was created by the Act.⁶¹ Thus, since the text of the Act itself was barren of any express or implied right to a pre-termination hearing, and since no property interest was created, the court of appeals reversed the decision of the trial court and held that due process requirements did not require a hearing prior to dismissal.⁶²

Interestingly, the Seventh Circuit Court of Appeals, in *Indiana State Employees Association v. Boehning*,⁶³ had earlier held that the Act did create a sufficient claim of entitlement to continued employment, a property interest, to require “notice and hearing before discharge.”⁶⁴ The Seventh Circuit construed the Act as authorizing dismissal on two grounds: (1) Dismissal for cause under section 6⁶⁵ and (2) dismissal on account of political affiliation under section 5.⁶⁶ The court reasoned that, because only two types of grounds were specifically listed, the Act excluded dismissal for other grounds.⁶⁷ The court concluded: “[T]he limitation to these two types of grounds are sufficient to support a claim of entitlement under the principles stated in *Roth* and *Sinderman*. ”⁶⁸

The decision of the Seventh Circuit appears to be well-reasoned, particularly in light of one of the Act’s stated purposes: “It is the intent of this chapter, however, to emphasize stability of government through continuity of employment and career opportunity.”⁶⁹ The

⁵⁸IND. CODE §§ 8-13-1.5-1 to 8 (1976). The ostensible purpose of the Act is to achieve a balance between the political affiliations of employees and to create a work force more responsive to the incumbent gubernatorial party.

⁵⁹373 N.E.2d at 177.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* at 178.

⁶³511 F.2d 834 (7th Cir.), *rev’d on other grounds*, 423 U.S. 6 (1975).

⁶⁴511 F.2d at 838.

⁶⁵*Id.* at 837-38 (construing IND. CODE § 8-13-1.5-6 (1976)). See note 57 *supra*.

⁶⁶511 F.2d at 837-38 (construing IND. CODE § 8-13-1.5-5 (1976)). See note 57 *supra*.

⁶⁷511 F.2d at 838.

⁶⁸*Id.* While the court’s holding was not expressly limited to dismissals for cause, one should note that it did emphasize that the plaintiff was not dismissed for political reasons. *Id.*

⁶⁹IND. CODE § 8-13-1.5-5 (1976).

Talley court was obviously not persuaded by the Seventh Circuit's construction of the Act. The court, noting that *Boehning* was reversed on the basis of abstention, stated that the case's impact had been severely limited.⁷⁰ Even if *Boehning* had not been subsequently appealed and reversed on other grounds, the decision would have had little precedential weight because the question of whether a "property interest" or a "claim of entitlement" has been created is a matter of state law and not federal constitutional law.⁷¹

In sharp contrast to *Talley* is *Wilson v. Review Board of the Indiana Employment Security Division*.⁷² In *Wilson* the facts disclosed that the appellant (Wilson) had begun receiving benefits in November, 1976. In December, Wilson's former employer submitted a report indicating that Wilson had refused suitable employment. Subsequently, when Wilson appeared to file her weekly claim, a deputy informed her that her benefits had been suspended because of her refusal. On these facts, the court of appeals held that an insured worker, who is receiving benefits pursuant to the Indiana Employment Security Act,⁷³ possesses a claim sufficient to constitute a property interest entitled to the protection of constitutional due process.⁷⁴

Yet, the gravamen of the opinion centered on the "specificity" of the relevant statute,⁷⁵ which included amended language that "benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing."⁷⁶ The state had argued that the provision had no application

⁷⁰373 N.E.2d at 176.

⁷¹See *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁷²373 N.E.2d 331 (Ind. Ct. App. 1978).

⁷³IND. CODE §§ 22-4-1-1 to 22-4-38-3 (1976 & Supp. 1978).

⁷⁴373 N.E.2d at 338.

⁷⁵IND. CODE § 22-4-17-2(e) (1976). The statute provides, in pertinent part, as follows:

In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of . . . the cause for which the claimant left his work, of such determination and the reasons thereof. . . . unless the claimant or such employer . . . asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. . . . In the event a hearing is requested by an employer or the division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing.

⁷⁶*Id.* as amended by Act of Feb. 17, 1972, Pub. L. No. 174, § 2, 1972 Ind. Acts 848.

since the decision of the deputy was a "new determination" rather than a decision affecting a pre-existing right. The court flatly rejected this argument, holding that the quoted amendment was a curative statute, which would be liberally construed and applied to situations involving interruption of benefits as well as disputes involving initial determination of eligibility.⁷⁷ Thus, the case was ultimately decided by reliance on the clear language of the legislative amendment expressly authorizing a pre-termination due process hearing, rather than on a constitutional basis.

Nevertheless, *Wilson* is an excellent review of procedural due process considerations, and is highly recommended to both the student and practitioner of administrative law. It is especially interesting because, although the decision was eventually anchored in statutory construction, the court actually structured, in the course of its opinion, a constitutional argument which supports the results achieved.

III. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

1. *Waiver of Change of Venue*.—In *Pruden v. Trabits*,¹ both the complaint and a motion for change of venue from the county were filed on the same day. The court granted the motion for change of venue and named five counties from which the plaintiff struck one. The defendants did not, however, strike any counties within the time limits in Trial Rule 76(9).²

The court of appeals held that Trial Rule 76(9) requires that the moving party inquire whether the other parties have struck any county,³ and if they have not, then the moving party must timely re-

¹373 N.E.2d at 343-44.

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The author wishes to extend his appreciation to Roger D. Erwin for his assistance in the preparation of this discussion.

²370 N.E.2d 959 (Ind. Ct. App. 1977).

³IND. R. TR. P. 76(9) provides in part: "[T]he parties within seven [7] days thereafter, or within such time, not to exceed fourteen [14] days, as the court shall fix, shall each alternatively strike off the names of such counties."

⁴IND. R. TR. P. 76(9) also provides in part:

If a moving party fails to so strike within said time, he shall not be entitled to a change of venue, and the court shall resume general jurisdiction of the

quest the clerk to strike for the nonmoving parties.⁴ Absent a timely request, the moving party has waived the opportunity for a change of venue.⁵

2. *Attorney's Duty to Examine Court Records.*—An attorney is not expected to be aware of last minute changes to court records, if it would be unreasonable to expect him to know of the changes. In *Ed Martin Ford, Inc. v. Martin*,⁶ the trial court did not set the date for the trial until the day on which the trial was to be held. The Indiana Court of Appeals held that, if an attorney is not aware of changes in the court record that "a careful and diligent lawyer would not reasonably have been expected to discover,"⁷ as in the present case, then the attorney should not be prejudiced by a failure to examine the court records.⁸ Thus, the appellate court ruled that the trial court had abused its discretion in not granting a motion for relief from judgment pursuant to Trial Rule 60.⁹

3. *Service of Process on City Attorneys.*—Trial Rule 4.6(A)(4),¹⁰ on its face, could be interpreted to mean that, if any statute provides for an attorney to represent a local government organization, the attorney must be served with notice of any action brought against the organization. The court of appeals rejected this interpretation in *Antz v. City of Jeffersonville*.¹¹ In that case, the plaintiff had brought an action to obtain reinstatement and back pay from the Jeffersonville Fire Department. The trial court dismissed the action because no summons had been issued or served upon the Jeffersonville City Attorney, which the trial court held to be required by Trial Rule 4.6(A)(4).

The Indiana statute governing the dismissal of firemen provides: "Such city shall be named as the sole defendant and the plaintiff shall cause summons to issue as in other cases against such city."¹² Service in a suit against a city "may be had upon the mayor, and, in his absence, upon the city clerk"¹³

cause. If a nonmoving party fails to strike off the names of such counties within the time limited, then the clerk shall strike off such names for such party.

⁴370 N.E.2d at 962.

⁵*Id.*

⁶363 N.E.2d 1292 (Ind. Ct. App. 1977).

⁷*Id.* at 1295.

⁸*Id.*

⁹*Id.*

¹⁰IND. R. TR. P. 4.6(A)(4) provides for service upon an organization as follows: "In the case of a local governmental organization upon the executive thereof, and if a statute provides for an attorney to represent the local government organization, and an attorney occupies such position, then also upon such attorney."

¹¹363 N.E.2d 1014 (Ind. Ct. App. 1977).

¹²IND. CODE § 18-1-11-3 (1976).

¹³*Id.* § 18-1-23-1.

The city argued that Trial Rule 4.6(A)(4) superseded Indiana Code section 18-1-23-1. Further, the city argued that the plaintiff was required to serve or issue process upon the city attorney because Indiana Code section 18-1-6-13 provides that the city attorney "shall have the management, charge and control of the law business of such city and for each branch of its government . . . He shall conduct all legal proceedings authorized by this act . . ."¹⁴

The Indiana Court of Appeals rejected this reasoning. It held that the better interpretation of Trial Rule 4.6(A)(4) is: "[I]f the statute upon which plaintiff is bringing the action provides for an attorney to represent the local governmental organization then such attorney should be notified."¹⁵ Such service, however, would not be necessary whenever *any* statute provides for an attorney to represent the local government.¹⁶

B. Pleadings and Pre-Trial Motions

1. *Judicial Admission in Pleadings.*—An admission in the pleadings is not always binding upon a party. In *Lamb v. Thieme*¹⁷ the plaintiff claimed that the defendant had accepted thirty shares of stock, instead of 120 shares which were originally agreed upon to secure a promissory note, as discharge of the promissory note. Yet, the plaintiff averred in his complaint that he owned all 120 shares of stock. The defendant denied that the plaintiff owned the stock, and claimed that the plaintiff's admission in the pleadings of full ownership of the stock precluded the plaintiff's assertion that thirty shares of stock were accepted as an accord and satisfaction.

The court of appeals agreed with the trial court's ruling that the defendant's denial put the question of ownership in issue.¹⁸ Hence, an admission in the pleadings is not binding upon a party where the opposing party denies the admission and joins issue upon it.¹⁹

2. *Compulsory Counterclaims.*—An attorney must carefully assert all counterclaims which are compulsory, or lose the right to assert them later. *Middelkamp v. Hanewich*²⁰ presented the question of whether a claim in prior litigation between the parties was a compulsory counterclaim and, thus, subject to the principle of res judicata in a subsequent action.

¹⁴363 N.E.2d at 1017 (citing IND. CODE § 18-1-6-13 (1976)).

¹⁵363 N.E.2d at 1017 (emphasis added).

¹⁶*Id.*

¹⁷367 N.E.2d 602 (Ind. Ct. App. 1977).

¹⁸*Id.* at 603.

¹⁹*Id.* at 605 (citing *Brown v. Grzeskowiak*, 230 Ind. 110, 101 N.E.2d 639 (1951)).

²⁰364 N.E.2d 1024 (Ind. Ct. App. 1977).

In 1969, Hanewich was successful in a suit against Middelkamp to obtain possession of certain land which had been transferred to Hanewich. In 1973, Middelkamp sued Hanewich, seeking: (1) Specific performance of an alleged 1966 oral agreement, (2) declaration of a trust in his favor as to the property, and (3) damages for breach of an alleged oral agreement to convey. The court of appeals affirmed a trial court ruling that, since these claims were not asserted as a counterclaim in the 1969 action, the claims could not be asserted in the present action.²¹

The Indiana Court of Appeals discussed the relationship of Trial Rule 13(A) to the doctrine of res judicata. Trial Rule 13(A) could be the source of the rule which bars a later counterclaim,²² or the result of the principle of res judicata.²³ Under either view, it is clear that Trial Rule 13(A) would bar a subsequent assertion of a compulsory counterclaim. To determine whether a counterclaim is compulsory, one must first determine whether the claim “[arose] out of the transaction or occurrence that is the subject-matter of the opposing party's claim . . .”²⁴ This is a test of logical relationship, which may include a series of transactions.²⁵ Also, the test broadly interprets the phrase “transaction or occurrence” to avoid multiplicity of litigation.²⁶

In this case, the “same transaction or occurrence” test was met, as well as the other requirements of Trial Rule 13(A).²⁷

3. *Amended Pleadings.*—In *State Farm Mutual Automobile Insurance Co. v. Shuman*²⁸ suit was brought upon an insurance policy. Two and a half years after the pre-trial conference and two weeks before the scheduled trial, the plaintiff was permitted to amend the complaint by adding a claim for punitive damages. State Farm con-

²¹*Id.* at 1034-36.

²²*Id.* at 1034.

²³*Id.* (citing C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 79, at 347 (2d ed. 1970)).

²⁴364 N.E.2d at 1035 (quoting IND. R. TR. P. 13(A)).

²⁵364 N.E.2d at 1035 (citing *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926)).

²⁶364 N.E.2d at 1035. See Civil Code Study Commission Comments to IND. R. TR. P. 13(A); 2 W. HARVEY, INDIANA PRACTICE 20 (1970); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1410 (1971).

²⁷364 N.E.2d at 1035. IND. R. TR. P. 13(A) requires that the counterclaim be mature at the time of the claim, that the court be able to acquire jurisdiction over all parties, and that the counterclaim not be the subject of another pending action when the claim is brought.

²⁸370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 45-48, 61-67, & 173-78 *infra* and accompanying text.

tended that the trial court abused its discretion in granting the plaintiff leave to amend.

The court of appeals held that, under Trial Rule 15(A),²⁹ leave of court is granted "when justice so requires."³⁰ This means that amendments are to be freely permitted so that all issues will be brought before the court.³¹ The court said that the delay in amending the complaint, the burden of further discovery, the death of a witness who was not indispensable, and the increased expense of discovery did not show that prejudice would result if the amendment were allowed.³²

State Farm also contended that the plaintiff could not amend because defendant's motion to dismiss pursuant to Trial Rule 12(B)(6) was granted, and that Trial Rule 12(B)(8)³³ read in conjunction with Trial Rule 6(C)³⁴ imposes an absolute deadline of ten days for amendment of the pleadings. The Indiana Court of Appeals held that a motion under Trial Rule 12(B)(6) merely changes the time limits for amendment of pleadings *as of right*, for, if the motion is granted, plaintiff may amend within ten days *as of right*.³⁵ After ten days has expired, an amendment is permitted by leave of court or by the con-

²⁹IND. R. TR. P. 15(A) provides in part: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires."

³⁰370 N.E.2d at 948 (citing *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985 (Ind. 1977)). See *Harvey, Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 66 (1977) [hereinafter cited as *Harvey, 1977 Survey*].

³¹370 N.E.2d at 948.

³²*Id.*

³³IND. R. TR. P. 12(B) provides in part:

When a motion to dismiss is sustained for failure to state a claim under subsection (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.

³⁴*Id.* 6(C) provides in part:

The service of a motion permitted under Rule 12(B) alters the time for service of responsive pleadings as follows, unless a different time is fixed by the court:

(2) if the court grants the motion and corrective action is allowed to be taken, it shall be taken within ten [10] days, and the responsive pleading shall be served within ten [10] days thereafter.

³⁵370 N.E.2d at 949. IND. R. TR. P. 15(A) provides in part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served.

sent of the adverse party.³⁶ Similarly, Trial Rule 6(C)(2) merely refers to amendments as of right, and does not affect the provisions of Trial Rule 15(A), except as to amendments as of right.

In *State ex rel. Crane Rentals, Inc. v. Madison Superior Court*³⁷ the Indiana Supreme Court considered the relationship between Trial Rule 15(C)³⁸ and Trial Rule 76(1), (2).³⁹ The complaint was amended to bring in four additional defendants, including Crane, nine months after the answer was filed. Crane then filed a motion for change of venue from the county. The trial court denied the motion, and this original proceeding for a writ of mandate was commenced in the supreme court.

Trial Rule 76(2) requires a motion for automatic change of venue to be filed within ten days after the issues are first closed on the merits. The supreme court had already held in *State ex rel. Travelers Insurance Co. v. Madison Superior Court*,⁴⁰ however, that parties added after the issues were first closed on the merits would not be barred by the expiration of the ten-day period.⁴¹ The trial court, here, sought to distinguish the present case from *Travelers* on the grounds that Crane had a close relationship with one of the original defendants, and was represented by the same attorney as that defendant. Thus, the trial court argued, the issues as to Crane were closed prior to the amended complaint adding him as a party under the “relation-back” concept in Trial Rule 15(C),⁴² or under a “virtual representation” concept.

The supreme court disagreed with this novel approach, holding that it would change the purpose of Trial Rule 76(2) “from one of simply setting a fair time limitation upon the exercise of the right to eliminating the right entirely for some and requiring that the right be exercised jointly by groups of others.”⁴³

4. *Pleading Special Matters.*—Trial Rule 9(B) requires: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred. Malice, intent, knowledge,

³⁶See IND. R. TR. P. 12(B)(8).

³⁷365 N.E.2d 1224 (Ind. 1977).

³⁸IND. R. TR. P. 15(C) governs the relation back of amendments.

³⁹IND. R. TR. P. 76 governs change of venue.

⁴⁰354 N.E.2d 188 (Ind. 1976). See Harvey, 1977 Survey, *supra* note 30, at 57.

⁴¹354 N.E.2d at 191.

⁴²IND. R. TR. P. 15(C) provides in part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied

⁴³365 N.E.2d at 1225.

and other conditions of mind may be averred generally."⁴⁴ In *State Farm Mutual Automobile Insurance Co. v. Shuman*⁴⁵ the defendant argued that the plaintiff's claim for punitive damages, in an action for breach of contract, failed to comply with the provisions of Trial Rule 9(B) because fraud was not specifically averred in the complaint.

The court of appeals held that proof of actionable fraud is not required for an award of punitive damages, since the award may be based on any serious wrong which is tortious in nature.⁴⁶ A plaintiff need only allege a fraudulent state of mind, thus requiring a general averment pursuant to Trial Rule 9(B).⁴⁷ Consequently, a complaint for breach of contract which demands punitive damages need only allege, generally, a fraudulent state of mind.⁴⁸

5. *Res Judicata and Interpleader*.—Trial Rule 22, which provides for interpleader, states interpleader requires that the plaintiff "is or may be exposed to double or multiple liability."⁴⁹ The question raised in *United Farm Bureau Family Life Insurance Co. v. Fultz*⁵⁰ was whether the acquittal in a criminal trial of the beneficiary of a life insurance policy, who was charged with the murder of the insured, obviated the need for interpleader in a civil trial. The insurer alleged that both the beneficiary and the deceased's estate might be entitled to the proceeds of the insurance policy.

The court of appeals noted that the rule in Indiana is that acquittal in a criminal trial is not res judicata to an issue of civil liability.⁵¹ Consequently, the beneficiary might not be entitled to the proceeds of the insurance policy, even though she was acquitted of murdering the insured. Interpleader pursuant to Trial Rule 22 was proper in this case because the insurer "is or may be exposed to double or multiple liability"⁵² as required by Trial Rule 22 for an interpleader action.

⁴⁴IND. R. TR. P. 9(B).

⁴⁵370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 28-36 *supra*; 61-67, & 173-78 *infra* and accompanying text.

⁴⁶370 N.E.2d at 950 (citing *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976); *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976)). See also *Frandsen, Insurance, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 260 (1975).

⁴⁷370 N.E.2d at 950 (citing *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92, *aff'd on rehearing*, 154 Ind. App. 657, 294 N.E.2d 617 (1973)).

⁴⁸370 N.E.2d at 950.

⁴⁹IND. R. TR. P. 22.

⁵⁰375 N.E.2d 601 (Ind. Ct. App. 1978).

⁵¹*Id.* at 608. See *National City Bank of Evansville v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957); *Beene v. Gibraltar Indus. Life Ins. Co.*, 116 Ind. App. 290, 63 N.E.2d 299 (1945).

⁵²IND. R. TR. P. 22(A).

C. Pre-Trial Procedures and Discovery

1. *Pre-Trial Orders.*—In *City of Hammond v. Drangmeister*⁵³ the Indiana Court of Appeals discussed the effect of Trial Rule 16(J)⁵⁴ upon the issues raised in the pleadings. The trial court, in the pre-trial order, sustained a motion to strike the city's exception to the appraiser's award in an inverse condemnation action. Yet, the pre-trial order listed the question of damages as the sole issue to be determined by the jury.

The appellate court affirmed the trial court's ruling that the pre-trial order preserved the issues of damages for consideration by the jury.⁵⁵ Hence, the issues at trial are as stated in the pre-trial order, and the pleadings do not control.⁵⁶

Trial Rule 16(J) states that a pre-trial order controls the matters considered at trial "unless modified thereafter to prevent manifest injustice."⁵⁷ The Indiana Court of Appeals in *Fruehauf Trailer Division v. Thornton*⁵⁸ affirmed a trial court ruling that a pre-trial order that counsel was instructed to submit one month before trial, and that was not submitted until the day of the trial, was not binding on either party.⁵⁹ The opposing party had not complained of the delay until the day of trial. Such dilatory conduct by both parties permitted the trial court to modify the pre-trial order pursuant to Trial Rule 16(J) "to prevent manifest injustice."⁶⁰

In *State Farm Mutual Automobile Insurance Co. v. Shuman*⁶¹ the court of appeals held that Trial Rule 16(A)(6)⁶² requires the trial

⁵³364 N.E.2d 157 (Ind. Ct. App. 1977).

⁵⁴IND. R. TR. P. 16(J) provides in part:

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleading, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreement of counsel, and such order when entered shall control the subsequent course of action

⁵⁵364 N.E.2d at 161.

⁵⁶*Id.* (citing *North Miami Consol. School Dist. v. State*, 261 Ind. 17, 300 N.E.2d 59 (1973)). See generally Annot., 22 A.L.R.2d 599, § 4 (1952); 62 AM. JUR. 2d *Pretrial Conference* §§ 33-35 (1972).

⁵⁷IND. R. TR. P. 16(J).

⁵⁸366 N.E.2d 21 (Ind. Ct. App. 1977).

⁵⁹*Id.* at 33.

⁶⁰*Id.* at 34. *Accord*, *State v. Dwenger*, 341 N.E.2d 776, 781 (Ind. Ct. App. 1976).

⁶¹370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 28-36 & 45-48 *supra* and accompanying text; notes 173-78 *infra* and accompanying text.

⁶²IND. R. TR. P. 16(A) provides in part: "In any action except criminal cases, the court may in its discretion and shall upon the motion of any party, direct the attorney for the parties to appear before it for a conference to consider . . . such other matters as may aid in the disposition of the action."

court to enter a pre-trial order where questions of law are raised at the pre-trial conference.⁶³ Otherwise, it is undoubtedly more difficult for the parties to present their cases at trial. State Farm, however, did not object to the failure of the court to enter a pre-trial order. If a pre-trial order has been entered, an objection is necessary to preserve the issue for appeal.⁶⁴ The appellate court held that an objection is also necessary to preserve the issue for appeal if a pre-trial order has not been entered.⁶⁵ Thus, State Farm could not raise objection to the failure of the trial court to enter a pre-trial order.

Even if State Farm could have raised the issue on appeal, however, there would have been no reversible error. Trial Rule 16(J) states: "The court shall make an order which recites . . . the agreements made by the parties as to any of the matters considered which limit the issues for trial . . ."⁶⁶ State Farm admitted that no agreement was reached which limited the issues for trial. Hence, the error was harmless.⁶⁷

2. *Discovery*.—In *State Highway Commission v. Jones*⁶⁸ the state requested production of documents, pursuant to Trial Rule 34,⁶⁹ which would have produced materials containing the opinions of experts who were hired by Jones. When the materials were not forthcoming, the state moved, under Trial Rule 37,⁷⁰ to compel discovery. The trial court denied the motion, and the state appealed from that ruling.

The court of appeals affirmed the ruling and held that until a request is made under Trial Rule 26(B)(3)(b)⁷¹ no request under Trial

⁶³370 N.E.2d at 951.

⁶⁴*Id.* (citing *Hodgson v. Humphries*, 454 F.2d 1279 (10th Cir. 1972)).

⁶⁵370 N.E.2d at 951.

⁶⁶IND. R. TR. P. 16(J).

⁶⁷370 N.E.2d at 951 (citing *Scott County School Dist. One v. Asher*, 160 Ind. App. 299, 312 N.E.2d 131 (1974), *aff'd*, 263 Ind. 47, 324 N.E.2d 496 (1975); *Burger Man Inc. v. Jordan Paper Prods., Inc.*, 352 N.E.2d 821 (Ind. App. 1976)).

⁶⁸363 N.E.2d 1018 (Ind. Ct. App. 1977).

⁶⁹IND. R. TR. P. 34 provides, in part, for the discovery of documents.

⁷⁰IND. R. TR. P. 37 provides sanctions for failure to make discovery.

⁷¹IND. R. TR. P. 26(B)(3)(b) provides:

As an alternative or in addition to obtaining discovery under subdivision (B)(3)(a) of this rule, a party by means of interrogatories may require any other party

(i) to identify each person whom the other party expects to call as an expert witness at trial, and

(ii) to state the subject-matter upon which the expert is expected to testify.

Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject-matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.

Rule 34 will be considered.⁷² The court stated that Trial Rule 26(B)(3)(a)⁷³ applies to experts who *will not* be called as witnesses at trial, and, in that situation, good cause must be shown.⁷⁴ Trial Rule 26(B)(3)(b) refers to an expert who *will* be called as a witness at trial. It does not require a showing of good cause, but it does require that interrogatories be the *only* means by which the identity of expert witnesses or the subject matter upon which they will testify can be obtained.⁷⁵

Such an interpretation of Trial Rule 26(B)(3)(b) is necessary, the court said, because the subject matter of future discovery is narrowed, thereby limiting future discovery "to the facts and opinions that the expert witness will give . . . at trial."⁷⁶ The court of appeals held that, even though Jones' counsel voluntarily provided the state with the identity of the witnesses and the subject matter upon which they were to testify, Trial Rule 26(B)(3)(b) requires that this information be obtained *only* through interrogatories.⁷⁷ Thus, the state's failure to comply with Trial Rule 26(B)(3)(b) precluded the state from further discovery of expert witnesses.

An extension of the problem just discussed was raised in *Costanzi v. Ryan*.⁷⁸ The Indiana Court of Appeals interpreted Trial Rule 26(B)(3)(b) to mean that, although a party can obtain the identity of expert witnesses and the subject matter on which they are expected to testify at trial by interrogatories, the interrogatories cannot also be used to obtain the facts and opinions of the expert witnesses.⁷⁹

In this case, the party seeking discovery argued that he was merely combining the discovery permitted under Trial Rule 26(B)(3)(b) with that permitted under the other rules of discovery. The court rejected this view stating that the facts and opinions may be obtained by the other rules providing for discovery,⁸⁰ but not by interrogatories.⁸¹

In *Colman v. Heidenreich*⁸² the Indiana Supreme Court considered the relationship between the attorney-client privilege and

⁷²363 N.E.2d at 1022.

⁷³IND. R. TR. P. 26(B)(3)(a) provides for discovery from experts.

⁷⁴363 N.E.2d at 1022.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸370 N.E.2d 1333 (Ind. Ct. App. 1978).

⁷⁹*Id.* at 1338. See 2 W. HARVEY, INDIANA PRACTICE 474 (1970).

⁸⁰See, e.g., IND. R. TR. P. 30 (Depositions Upon Oral Examination), 31 (Deposition of Witnesses Upon Written Questions), 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes).

⁸¹370 N.E.2d at 1338.

⁸²No. 1978 S 221 (Ind. Oct. 13, 1978).

Trial Rule 26(C).⁸³ A male client told his attorney, Colman, that the client's female friend had driven a car involved in a hit-and-run accident; the female was alleged also to be a client of Colman. The man and woman were not married to one another, and their relationship was not a public one. A criminal and a civil suit were pending against Tabereaux for the injuries to Heidenreich in the accident. This information, held to have been unrelated to the legal problem for which the male client had sought advice,⁸⁴ was related by Colman to the Monroe County Prosecutor without identification of the clients. Subsequently, an attorney representing Tabereaux attempted to obtain the identify of Colman's clients. Colman then moved for a protective order under Trial Rule 26(C). The trial court's refusal to grant that order was reversed by the court of appeals. The trial court order would have required Colman, if asked to do so, to reveal the name of the male client, the full conversation between Colman and the male client, and the identity of the woman.

The supreme court found a confrontation between the attorney-client privilege and the "need and desire to get to the truth to render justice to those seeking it"⁸⁵ Under Indiana law, the attorney has a duty "[t]o maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client."⁸⁶ The court ruled that the attorney had the right not to reveal the male client's identity or the precise conversation with the male client since such revelations would disclose the secret of the clandestine relationship between the man and the woman.⁸⁷ However, the attorney had no right to refuse to reveal the woman's identity because there was no confidential relationship between her and Colman on the Heidenreich matter since she had not consulted Colman on it nor was the male client acting as her agent regarding it.⁸⁸

3. *Sanctions for Failure to Follow Discovery Rules.*—The sanctions for failure to comply with the discovery rules can be severe. In *Finley v. Finley*⁸⁹ the court of appeals upheld a trial court order that the husband, in a dissolution of marriage action, pay for the audit of a corporation and pay an additional \$50,000 in attorney's fees to his

⁸³IND. R. TR. P. 26(C) provides that, when good cause is shown, a variety of measures can be taken by the court to protect a party from embarrassment and oppression.

⁸⁴No. 1978 S 221, slip op. at 12.

⁸⁵*Id.*, slip op. at 3.

⁸⁶IND. CODE § 34-1-60-4 (1976).

⁸⁷No. 1078 S 221, slip op. at 11.

⁸⁸*Id.*, slip op. at 9. The author believes that the court should have protected the secrecy of the names of both the male and female clients, as the court of appeals had held. *Colman v. Heidenreich*, 366 N.E.2d 686 (Ind. Ct. App. 1977).

⁸⁹367 N.E.2d 1126 (Ind. Ct. App. 1977). For another discussion of this case, see Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 187 (1978).

former wife's attorney. The additional attorney's fees were caused by the husband's failure to adequately respond to discovery.

The appellate court said that sanctions, pursuant to Trial Rule 37(B)(2)(c),⁹⁰ were not limited to expenses for the enforcement of the discovery order.⁹¹ The Indiana Rules do not specifically permit the court to make orders "as are just."⁹² Notwithstanding the absence of such express language in the Indiana Rules, the intent and purpose of the rules would best be served by permitting orders "as are just."⁹³ The inherent power of the court to promote a speedy adjudication of the issues is another source of judicial power which would support a finding that the trial court did not abuse its discretion in ordering the sanctions.⁹⁴

Failure to comply with the discovery rules may result in dismissal of the action. In *Legal v. Cruse*⁹⁵ the Indiana Supreme Court upheld a trial court ruling which dismissed the action pursuant to Trial Rule 37(B)(4).⁹⁶ The plaintiff, his attorney, and his physician all failed to appear for depositions. The trial court dismissed the action when the plaintiff failed to pay \$1,200 in costs of depositions to the defendants as ordered by the court.

The plaintiff argued that he had no notice of the deposition, but the supreme court stated that notice was given to the plaintiff's attorney as required by Trial Rule 5 and that dismissal of the action was not an abuse of the trial court's discretion.⁹⁷

D. Trial and Judgment

1. *Amendment to Conform to the Evidence.*—If a motion to conform the pleadings to the evidence is improperly denied, the court may correct the error in the entry of judgment. The court of appeals, in *Urbanational Developers, Inc. v. Shamrock Engineering, Inc.*,⁹⁸ noted that the purpose of Trial Rule 15(B)⁹⁹ is to encourage

⁹⁰IND. R. TR. P. 37(B)(2) provides in part: "The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is: . . . in bad faith and abusively resisting or obstructing a deposition"

⁹¹367 N.E.2d at 1127.

⁹²Cf. FED. R. CIV. P. 37(b) (providing for orders "as are just").

⁹³367 N.E.2d at 1127 (citing 2 W. HARVEY, INDIANA PRACTICE 522-23 (1970)).

⁹⁴367 N.E.2d at 1127.

⁹⁵368 N.E.2d 235 (Ind. 1977), cert. denied, 98 S.Ct. 1523 (1978). Other aspects of this case are discussed in notes 223-26 *infra* and accompanying text.

⁹⁶*Id.* at 238. IND. R. TR. P. 37(B) provides in part:

To avoid abuse of discovery proceedings . . . (4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to delay or obstruct the rights of the opposing party that any other relief would be inadequate.

⁹⁷368 N.E.2d at 238.

⁹⁸372 N.E.2d 742 (Ind. Ct. App. 1978).

⁹⁹IND. R. TR. P. 15(B) provides:

relief to the parties based upon the evidence presented at trial, even though the pleadings differ from the evidence presented.¹⁰⁰ In this case, evidence was admitted at trial without objection, but the trial court erred in denying a motion to conform the pleadings to the evidence pursuant to Trial Rule 15(B).¹⁰¹

The trial court, however, corrected the error by entering a judgment which conformed to the evidence, in effect "implicitly rescind[ing] the order without resulting in prejudice" to the opposing parties.¹⁰²

2. *Involuntary Dismissal.*—In *Fielitz v. Allred*¹⁰³ the Indiana Court of Appeals held that the standard for involuntary dismissal under Trial Rule 41(B)¹⁰⁴ requires the court to "consider only the evidence most favorable to the nonmoving party in ruling upon such a motion. The trial court may not weigh the testimony of one witness against the conflicting testimony of another witness, nor may it weigh conflicting portions of the testimony of the same witness."¹⁰⁵ This case was incorrectly decided in this writer's opinion. The standard under Trial Rule 41(B), where trial is by the court and where the court may make findings of fact, should allow the trial court to weigh the evidence.¹⁰⁶ The standard which the court used is applicable under Trial Rule 50,¹⁰⁷ where trial is by jury. The standard

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

¹⁰⁰372 N.E.2d at 751 (citing *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 300 N.E.2d 335 (1973)).

¹⁰¹372 N.E.2d at 751. See also 2 W. HARVEY, INDIANA PRACTICE 122 (1970).

¹⁰²372 N.E.2d at 752.

¹⁰³364 N.E.2d 786 (Ind. Ct. App. 1977).

¹⁰⁴IND. R. TR. P. 41(B) provides in part that a party may move for dismissal, where trial is by court, "on the ground that considering all the evidence and reasonable inferences therefrom" the allegations of the nonmoving party cannot be sustained.

¹⁰⁵364 N.E.2d at 787 (quoting *Building Syss., Inc. v. Rochester Metal Prod., Inc.*, 340 N.E.2d 791, 793 (Ind. Ct. App. 1976)). See also 3 W. HARVEY, INDIANA PRACTICE 212 (1970) (Civil Code Study Commission Comments).

¹⁰⁶See 3 W. HARVEY, INDIANA PRACTICE 217 (1970) (author's comments).

¹⁰⁷IND. R. TR. P. 50 provides for judgment on the evidence.

under Trial Rule 50 should have no application to a motion made under Trial Rule 41(B).

An interesting variation of the problem just discussed was presented in *Board of Aviation Commissioners v. Schafer*.¹⁰⁸ The plaintiff agreed with the trial court that the standard under Trial Rule 41(B) for involuntary dismissal is that the court must consider only the evidence and reasonable inferences most favorable to the nonmoving party.¹⁰⁹ The plaintiff, however, claimed that when special findings of fact are requested, as provided by Trial Rule 52(A) and Trial Rule 41(B), the court must weigh the evidence. The court of appeals rejected this argument, and stated: "[E]ven where a motion for special findings of fact has been made, the trial court must view the evidence in a light most favorable to the plaintiff or party with the burden of proof."¹¹⁰ This case was incorrectly decided, in this writer's opinion, for the same reasons as *Fielitz*.

Trial Rule 41(A)(2) provides, in part: "[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."¹¹¹ In *City of Indianapolis v. Central Railroad*,¹¹² the court of appeals interpreted this language to mean that attorney's fees may not be awarded pursuant to Trial Rule 41(A)(2).¹¹³ While noting that federal courts have awarded attorney's fees under Federal Rule of Civil Procedure 41(b), the court found no Indiana cases in which the court awarded attorney's fees under Trial Rule 41(A)(2).¹¹⁴ The only Indiana cases which had interpreted this language in Trial Rule 41(B) were *State v. Holder*¹¹⁵ and *State v. Renthcler*,¹¹⁶ in which one judge specifically rejected the argument that "terms and conditions" could include an award of attorney's fees.¹¹⁷ Consequently, the court of appeals denied an award of attorney's fees under Trial Rule 41.¹¹⁸

3. *Judgment on the Evidence.*—In *American Turners of South Bend v. Rodefer*¹¹⁹ the court of appeals stated that, when a party

¹⁰⁸366 N.E.2d 195 (Ind. Ct. App. 1977).

¹⁰⁹*Contra*, 3 W. HARVEY, INDIANA PRACTICE 217 (1970) (author's comments).

¹¹⁰366 N.E.2d at 197. Compare *Schafer* with the supreme court's opinion in *State ex rel. Peters v. Bedwell*, 371 N.E.2d 709 (Ind. 1973), and the discussion at notes 149-52 *infra* and accompanying text.

¹¹¹IND. R. TR. P. 41(A)(2).

¹¹²369 N.E.2d 1109 (Ind. Ct. App. 1977).

¹¹³*Id.* at 1114.

¹¹⁴*Id.* See also *Wilson v. Jolly*, 7 F.R.D. 649 (D.C. Tex. 1948).

¹¹⁵260 Ind. 336, 295 N.E.2d 799 (1973).

¹¹⁶*Id.*

¹¹⁷*Id.* at 336, 348-49, 295 N.E.2d at 799, 801-02 (Prentice, J., concurring).

¹¹⁸369 N.E.2d at 1114.

¹¹⁹372 N.E.2d 516 (Ind. Ct. App. 1978).

moves for judgment on the evidence under Trial Rule 50(A),¹²⁰ the trial court must

consider only the evidence and reasonable inferences most favorable to the nonmoving party. The motion may be granted only if there is no substantial evidence or reasonable inference to be drawn therefrom to support an essential element of the claim. If there is any evidence or reasonable inferences to be drawn from the evidence, or if reasonable men might differ, then judgment on the evidence is improper.¹²¹

In this case, Rodefer argued that, where both parties have moved for judgment on the evidence, the case is withdrawn from the jury. Thus, the court would be the trier of fact, and would have to weigh the evidence. The court disagreed with Rodefer and held that Trial Rule 50(A) was intended to supersede the law prior to Trial Rule 50 which was that a motion for a directed verdict by both parties waived the right to jury trial.¹²²

4. *Summary Judgment.*—In *Randolph v. Wolff*¹²³ the plaintiff brought an action for breach of contract for the sale of certain land. The dispute centered around the interpretation of a document which described the boundaries of the land to be sold. In support of his motion for summary judgment, the defendant presented a survey which contained his interpretation of the document and another survey which purported to contain the plaintiff's interpretation of the document. The defendant then claimed that the plaintiff's interpretation would not be admissible due to the Statute of Frauds.

The Indiana Court of Appeals reversed the trial court's grant of the motion for summary judgment.¹²⁴ The appellate court held that the trial court may not speculate on what evidence the plaintiff will present at trial.¹²⁵ Trial Rule 56(C) states that summary judgment is

¹²⁰IND. R. TR. P. 50(A) provides in part:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

¹²¹372 N.E.2d at 517 (citing *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985 (Ind. 1977). See *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976); *Lake Mortgage Co. v. Federal Nat'l Mortgage Ass'n*, 159 Ind. App. 605, 308 N.E.2d 739 (1974), *transfer denied*, 262 Ind. 601, 321 N.E.2d 556 (1975); *Harvey, 1977 Survey*, *supra* note 30, at 66.

¹²²372 N.E.2d at 518 (citing 3 W. HARVEY, INDIANA PRACTICE 365 (1970)).

¹²³374 N.E.2d 533 (Ind. Ct. App. 1978).

¹²⁴*Id.* at 536.

¹²⁵*Id.* at 535.

proper only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."¹²⁶ Since boundaries of land were in question, a material fact was in issue, making summary judgment improper. The plaintiff was entitled to an attempt to introduce whatever evidence he might have to support his claim.

A court may grant summary judgment in response to a defense raised in the pleadings under Trial Rule 12(B)(6),¹²⁷ in response to a motion under Trial Rule 12(B)(6), or in response to a motion for summary judgment under Trial Rule 56. In *Middelkamp v. Hanewich*,¹²⁸ the defendants, in their answer to the complaint, asserted the defense of failure to state a claim upon which relief can be granted. The trial court then granted summary judgment from which the plaintiffs appealed.

In affirming the trial court ruling, the court of appeals interpreted Trial Rule 12(B), which provides in part: "If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"¹²⁹ The court held that Trial Rule 12(B) does not distinguish between defenses raised pursuant to Trial Rule 12(B)(6) which are raised by motion, and those which are raised in a responsive pleading.¹³⁰ Consequently, where one asserts a defense under Trial Rule 12(B)(6) in a responsive pleading, it will be treated as a motion to dismiss.¹³¹ If matters outside the pleadings are presented to and not excluded by the court, then the "motion to dismiss" will be treated as a motion for summary judgment.¹³²

The defense of lack of jurisdiction, pursuant to Trial Rule 12(B)(1),¹³³ should not be asserted by a motion for summary judgment. In *Department of Revenue v. Mumma Brothers Drilling Co.*¹³⁴

¹²⁶IND. R. TR. P. 56(C).

¹²⁷IND. R. TR. P. 12(B)(6) is the defense of failure to state a claim upon which relief can be granted.

¹²⁸364 N.E.2d 1024 (Ind. Ct. App. 1977).

¹²⁹*Id.* at 1028 (quoting IND. R. TR. P. 12(B)).

¹³⁰*Id.* IND. R. TR. P. 12(B) provides in part: "Every defense . . . shall be asserted in the responsive pleading . . . if one is required; except that at the option of the pleader, the following defenses may be made by motion; . . . (6) Failure to state a claim upon which relief can be granted"

¹³¹364 N.E.2d at 1028.

¹³²*Id. Accord,* Alabama State Fed'n of Labor v. Kurn, 46 F. Supp. 385 (D. Ala. 1974).

¹³³IND. R. TR. P. 12(B) provides in part that the defense of lack of jurisdiction of the subject matter may be made by a responsive pleading or by a motion.

¹³⁴364 N.E.2d 167 (Ind. Ct. App. 1977).

the court of appeals held that, if the defense of lack of jurisdiction is raised by a motion for summary judgment, the court should merely treat it as a motion to dismiss under Trial Rule 12(B)(1).¹³⁵ Thus, if one alleges lack of jurisdiction in a motion for summary judgment, the effect will be the same as if he had made a motion to dismiss for lack of jurisdiction.

5. *Default Judgment.*—The court of appeals, in *Protective Insurance Co. v. Steuber*,¹³⁶ held that the notice requirement of Trial Rule 55(B)¹³⁷ does not apply to a defaulting party who has failed to appear in the action.¹³⁸ If the party against whom a default judgment is sought has appeared, however, written notice of the application for judgment must be given to the party at least three days before the hearing.¹³⁹

If a default judgment is entered on the issue of a party's liability, the party may still be entitled to a jury trial on the issue of damages. In *Kirk v. Harris*¹⁴⁰ a default judgment was entered against the defendant, Harris, who subsequently appeared by counsel and demanded a jury trial on the issue of damages. Kirk appealed the trial court ruling which granted Harris' demand for a jury trial, even though Kirk had previously requested a jury trial.

The Indiana Court of Appeals noted that Trial Rule 55(B) provides, in part: "If . . . it is necessary to take an account or to determine the amount of damages . . . the court . . . shall accord a right of trial by jury to the parties when and as required."¹⁴¹ Also, the defendant pointed out that, since the plaintiff had previously demanded a jury trial, Trial Rule 38(D) prevented the court from withdrawing the right to trial by jury without the permission of all parties.¹⁴² Further, the court said that, under Trial Rule 39(A)(2), the trial court must grant a jury trial on any issue to which a party is entitled to a jury trial as of right, provided that the party has made a demand

¹³⁵364 N.E.2d at 170 (citing *Marhoefer Packing Co. v. Ind. Dep't of State Revenue*, 157 Ind. App. 505, 301 N.E.2d 209 (1973)).

¹³⁶370 N.E.2d 406 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 215-22 *infra* and accompanying text.

¹³⁷IND. R. TR. P. 55(B) provides in part: "If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application."

¹³⁸370 N.E.2d at 410.

¹³⁹*Id.* at 409 (citing *Northside Cab Co. v. Penman*, 156 Ind. App. 577, 297 N.E.2d 838 (1973); *Hiatt v. Yergin*, 152 Ind. App. 497, 284 N.E.2d 834 (1972)).

¹⁴⁰364 N.E.2d 145 (Ind. Ct. App. 1977).

¹⁴¹*Id.* at 147 (quoting IND. R. TR. P. 55(B)).

¹⁴²IND. R. TR. P. 38(D) provides in part: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the other party or parties."

for a jury trial.¹⁴³ Consequently, the trial order which granted a jury trial was affirmed.¹⁴⁴

6. *Relief from Verdict.*—If a trial court vacates a prior judgment pursuant to Trial Rule 59(E)(7), the court must state the reasons for its action. In *Reynolds v. Meehan*¹⁴⁵ the trial court vacated the judgment against one defendant, but ordered the judgment against two other defendants to remain in full force. Trial Rule 59(E)(7) provides, in part: "If corrective relief is granted, the court shall specify the general reasons therefor."¹⁴⁶ The court of appeals wrote that Trial Rule 59(E)(7) "affords the litigants a statement of why the court has acted and makes a record sufficient for the court to review on appeal."¹⁴⁷ To ensure that the action which the trial court took was proper, the court of appeals reversed and remanded the case to the trial court, with instructions for the trial court to comply with Trial Rule 59(E)(7).¹⁴⁸

In *State ex rel. Peters v. Bedwell*¹⁴⁹ the Indiana Supreme Court discussed the standard for entry of judgment by the court pursuant to Trial Rule 50(A)¹⁵⁰ and Trial Rule 59(E)(7).¹⁵¹ The court noted that the identical language in these rules, that the verdict is "clearly erroneous as contrary to . . . the evidence,"¹⁵² is new legal language which must be interpreted consistently with the right to jury trial under the Indiana Constitution.¹⁵³ Thus, the jury may find against a party who has the burden of proof, even if that party has established a *prima facie* case. The court stated: "It is only where there is no reasonable dispute as to the facts, where the evidence for the party bearing the burden of proof is uncontradicted and unimpeached, that the trial court may enter judgment in favor of a party having the burden of proof."¹⁵⁴

¹⁴³364 N.E.2d at 147. *Accord*, *Bash v. Van Osdol*, 75 Ind. 186 (1881); *Briggs v. Sneghan*, 45 Ind. 14 (1873).

¹⁴⁴364 N.E.2d at 147.

¹⁴⁵375 N.E.2d 1119 (Ind. Ct. App. 1978).

¹⁴⁶IND. R. TR. P. 59(E)(7).

¹⁴⁷375 N.E.2d at 1123.

¹⁴⁸*Id.*

¹⁴⁹371 N.E.2d 709 (Ind. 1978).

¹⁵⁰See note 120 *supra*.

¹⁵¹IND. R. TR. P. 59(E)(7) provides in part:

In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence

¹⁵²371 N.E.2d at 712.

¹⁵³IND. CONST. art. 1, § 20.

¹⁵⁴371 N.E.2d at 712 (citing *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209 (1930); *Federal Ins. Co. v. Summers*, 403 F.2d 971 (1st Cir. 1968); *Friedline v. State*, 93 Ind. 366

In *Peters*, a jury had found in favor of the defendants in a medical malpractice action. The supreme court held that the trial court could not substitute a judgment in favor of the plaintiff, for the evidence was subject to reasonable dispute.¹⁵⁵

7. *Relief from Judgment.*—In *Irmiger v. Irmiger*¹⁵⁶ the trial court denied a motion by the defendant to correct errors. Instead of appealing that ruling, the defendant moved under Trial Rule 60 for relief from judgment, alleging excusable neglect and surprise. Appeal was taken from the denial of the motion for relief from judgment. The court of appeals dismissed the appeal, stating that Trial Rule 59(A)(9)¹⁵⁷ is a "catch all" provision which includes the grounds of surprise and excusable neglect.¹⁵⁸ Further, *any* error which can be corrected under Trial Rule 60 may be asserted in a motion to correct errors.¹⁵⁹ Thus, since the defendant attempted to raise errors in a motion pursuant to Trial Rule 60 that could have been raised in a motion to correct errors, the motion for relief from judgment was properly denied.¹⁶⁰

In *Sheraton Corp. of America v. Korte Paper Co.*¹⁶¹ the trial court had entered judgment against Korte and no appeal was taken after denial of the motion to correct errors. Subsequently, in *Sheraton Corp. of America v. Kingsford Packing Co.*,¹⁶² an unrelated case with allegedly identical facts, the Indiana Court of Appeals held the law to be contrary to the law applied by the trial court in *Korte*. Korte then sought to obtain relief from judgment pursuant to Trial Rule 60(B)(8),¹⁶³ claiming that the decision in *Kingsford* demonstrated that the trial court was in error. The court of appeals held that, indeed, the subsequent decision in *Kingsford* demonstrated that if Korte had appealed his case, he would have been successful.¹⁶⁴

(1884); *Gaff v. Greer*, 88 Ind. 122 (1882); *Fowler Utils. Co. v. Chaffin Coal Co.*, 43 Ind. App. 438, 87 N.E. 689 (1909); *Stephens v. American Car & Foundry Co.*, 38 Ind. App. 414, 78 N.E. 335 (1906)).

¹⁵⁵371 N.E.2d at 712.

¹⁵⁶364 N.E.2d 778 (Ind. Ct. App. 1977).

¹⁵⁷IND. R. TR. P. 59(A) provides: "The Court . . . shall enter an order for the correction of errors . . . , including . . . the following: . . . (9) For any reason allowed by these rules, statute or other law."

¹⁵⁸364 N.E.2d at 780.

¹⁵⁹*Id.*

¹⁶⁰*Id.* (citing *Warner v. Young America Volunteer Fire Dept.*, 326 N.E.2d 831 (Ind. Ct. App. 1975)).

¹⁶¹363 N.E.2d 1263 (Ind. Ct. App. 1977).

¹⁶²319 N.E.2d 852 (Ind. Ct. App. 1974).

¹⁶³IND. R. TR. P. 60(B)(8) provides in part that the court may grant relief from a final judgment, order, default or proceeding for "any . . . reason justifying relief from the operation of the judgment."

¹⁶⁴363 N.E.2d at 1265. See, e.g., *Martin v. Ben Davis Conservancy Dist.*, 238 Ind. 502, 153 N.E.2d 125 (1958).

However, it is only where *additional facts* invoke "the court's equity power to do justice that a party under the auspices of TR 60 may seek relief *on equitable grounds* from a prior judgment which has become final . . ."¹⁶⁵ Accordingly, the trial court abused its discretion in granting relief under Trial Rule 60.

In *State v. Martinsville Development Co.*,¹⁶⁶ the defendant moved under Trial Rule 60(B)(7)¹⁶⁷ for an award of additional damages, ten years after judgment was originally entered. The court of appeals pointed out that under Trial Rule 60(B)(7) the judgment must have *prospective application* for the rule to apply.¹⁶⁸ Since no Indiana case had interpreted this language, the court turned to the federal cases which had interpreted identical language in Federal Rule 60(b)(5). Most of the federal cases dealt with injunctions,¹⁶⁹ but the court stressed that relief pursuant to Trial Rule 60(B)(7) is not limited to relief from the effect of an injunction.¹⁷⁰ The court said that a judgment has prospective application under Trial Rule 60(B)(7)

when a person's right to do or not to do some act is continuously affected by the operation of the judgment in the future; or, the judgment is specifically directed toward some event which is to take place in the future and does not simply serve to remedy *past* wrongs.¹⁷¹

The court found that money judgments do not have prospective application, and reversed the trial court judgment which had granted relief pursuant to Trial Rule 60(B)(7).¹⁷²

E. Appeals

1. *Instructions.*—The court of appeals, in *State Farm Mutual Automobile Insurance Co. v. Shuman*¹⁷³ held that Trial Rule 51(C)¹⁷⁴

¹⁶⁵363 N.E.2d at 1265.

¹⁶⁶366 N.E.2d 681 (Ind. Ct. App. 1977).

¹⁶⁷IND. R. TR. P. 60(B)(7) provides that the court may grant relief from a final judgment, order, default, or proceeding when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . .".

¹⁶⁸366 N.E.2d at 684 (citing 7 J. MOORE, FEDERAL PRACTICE § 60.26[4] (2d ed. 1948); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2863 (1973)).

¹⁶⁹See, e.g., *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir. 1943).

¹⁷⁰366 N.E.2d at 684. See *Equitable Life Assurance Soc'y of United States v. MacGill*, 551 F.2d 978 (5th Cir. 1977) (declaratory judgment awarding attorney's fees modified pursuant to FED. R. Civ. P. 60(b)(5)-(6)).

¹⁷¹366 N.E.2d at 685.

¹⁷²*Id.*

¹⁷³370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 28-36; 45-48, & 61-67 *supra* and accompanying text.

¹⁷⁴IND. R. TR. P. 51(C) provides in part: "No party may claim as error the giving of

requires a party to object to an instruction which was given to the jury, but not to a requested instruction that was refused.

If a court commits a fundamental or plain error in giving an instruction, a party is not required to object to preserve the issue for appeal. The rationale is that fundamental error denies the injured party "fundamental due process."¹⁷⁵ In *United Farm Bureau Family Life Insurance Co. v. Fultz*¹⁷⁶ the appellate court held that fundamental error is not equivalent to prejudicial error.¹⁷⁷ Rather, "[f]undamental . . . error results only where a statement is made or an act is done which results in prejudicial error that goes to the very heart of a party's case and where that statement or act is wholly outside of the preventive or corrective powers of that party."¹⁷⁸ Thus, an instruction which shifted the burden of proof was not fundamental error because the error could have been corrected by a timely motion.

2. *Record of Proceedings.*—In *Dahlberg v. Ogle*¹⁷⁹ the judge's certificate stated that the transcript of the proceedings had been filed, but the transcript did not show a file stamp, the clerk's certificate did not state that the transcript had been filed, and the order book did not state that the transcript had been filed with the court. The Indiana Supreme Court held that, notwithstanding the requirements of Appellate Rule 7.2(A)(4),¹⁸⁰ the trial judge's certificate sufficiently evidenced the filing of the record.¹⁸¹

The court of appeals, in *Crown Aluminum Industries v. Wabash Co.*,¹⁸² held that it was error for the trial judge to refuse a request pursuant to Appellate Rule 7.2(D)¹⁸³ for a transcript of the record.¹⁸⁴

an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

¹⁷⁵Malo v. State, 361 N.E.2d 1201 (Ind. 1977).

¹⁷⁶375 N.E.2d 601 (Ind. Ct. App. 1978).

¹⁷⁷*Id.* at 610.

¹⁷⁸*Id.* at 611.

¹⁷⁹364 N.E.2d 1174 (Ind. 1977).

¹⁸⁰IND. R. APP. P. 7.2(A)(4) provides:

The transcript of the proceedings at the trial, including all papers, objections and other matters referred to above shall be presented to the judge who presided at the trial, who shall examine the same and if not true, correct the same without delay, and as finally settled by the court, shall sign the same, certifying to the same as being true and correct in said proceedings, and order the same filed and made a part of the record in the clerk's office.

¹⁸¹364 N.E.2d at 1175.

¹⁸²369 N.E.2d 945 (Ind. Ct. App. 1977).

¹⁸³IND. R. APP. P. 7.2(D) provides in part: "In all appeals from judgments determining the nomination or relation by the voters of any public officer, the original controverted ballots, papers, or other documents material to the determination of the nomination or election shall be made a part of the record on appeal"

¹⁸⁴369 N.E.2d at 947.

Here, the appellant had failed to make a timely appeal after the denial of his motion to correct errors. Thus, even though the trial judge may believe that the appellant is not entitled to relief upon appeal, the trial court may not withhold the record.¹⁸⁵

3. *Briefs.*—Attorneys must insure that their briefs meet the requirements in Appellate Rule 8.3(A)(7).¹⁸⁶ In *Hyatte v. Lopez*¹⁸⁷ the court of appeals held that an appellant's brief which neither cited authority nor argued in support of the contentions raised in the brief was not adequate for appeal.¹⁸⁸ Thus, the contentions raised in the brief without support were waived.

On the other hand, substantial compliance with Appellate Rule 8.3(A)(7) may be sufficient. In *Dahlberg* the supreme court held that, where the brief paraphrased the error assigned in the motion to correct errors and the opposing parties could respond without undue hardship or extraordinary expense, substantial compliance with Appellate Rule 8.3(A)(7) would suffice.¹⁸⁹ Hence, even though the brief did not point out verbatim objections to the instructions which were allegedly in error, the purpose of Appellate Rule 8.3(A)(7) had been met.

4. *Interlocutory Appeals.*—In *Indiana Bell Telephone Co. v. Friedland*¹⁹⁰ the trial court had certified an action as a class action pursuant to Trial Rule 23(A) and (B)(3). The court of appeals held that, on review of an interlocutory order certifying a class action, the appellate court can decide whether the trial court had subject matter jurisdiction to hear the case.¹⁹¹ The court stated that lack of jurisdiction over the subject matter can be raised at any time before final decision, in the trial court or on appeal.¹⁹² Also, under Trial Rule 23(B)(3), the court must determine whether the class action is "superior to other available methods for the fair and efficient adjudication of the controversy."¹⁹³ If the trial court does not have sub-

¹⁸⁵Id.

¹⁸⁶IND. R. TR. P. 8.3(A)(7) provides in part:

Each error assigned in the motion to correct errors that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities, statutes, and parts of the record relied upon, and a clear showing of how the issues and contentions in support thereof related to the facts of the case under review.

¹⁸⁷366 N.E.2d 676 (Ind. Ct. App. 1977).

¹⁸⁸Id. at 679.

¹⁸⁹364 N.E. 2d at 1175.

¹⁹⁰373 N.E.2d 344 (Ind. Ct. App. 1978).

¹⁹¹Id. at 346-47.

¹⁹²Id. (citing Decatur REMC v. PSC, 150 Ind. App. 193, 197, 275 N.E.2d 857, 860 (1971)).

¹⁹³373 N.E.2d at 347 (quoting IND. R. TR. P. 23(B)(3)).

ject matter jurisdiction, then, certainly, the class action is not a "superior" method of adjudication of the controversy.¹⁹⁴ Thus, the appellate court reversed the class certification due to the lack of subject matter jurisdiction at the trial court level.¹⁹⁵

The court of appeals, in *U.S. Aircraft Financing, Inc. v. Jankovich*,¹⁹⁶ determined that the granting of a motion to intervene is a nonappealable interlocutory order.¹⁹⁷ It had been decided, in *Weldon v. State*,¹⁹⁸ that an order denying intervention was appealable as a final order.¹⁹⁹ The court of appeals distinguished that case, however, by reasoning that a denial of intervention determines the outcome of a party's interest in the litigation, whereas an order granting intervention does not.²⁰⁰ Thus, since an order granting intervention is not a final order, it is not appealable under Appellate Rule 4(B).²⁰¹ Further, Trial Rule 24(C) provides, in part: "The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause."²⁰² Accordingly, the appellate court did not decide whether the intervention order was proper.

In *In re Newman*²⁰³ the Indiana Court of Appeals interpreted Appellate Rule 4(B)(1)²⁰⁴ to mean that an award of attorney fees is an appealable interlocutory order.²⁰⁵ Also, the court held that the failure to take an interlocutory appeal would not preclude the availability of appeal after final judgment unless the trial court had entered final judgment under Trial Rule 54(B).²⁰⁶ Interlocutory

¹⁹⁴373 N.E.2d at 347.

¹⁹⁵*Id.* at 352.

¹⁹⁶365 N.E.2d 783 (Ind. Ct. App. 1977).

¹⁹⁷*Id.* at 785.

¹⁹⁸258 Ind. 143, 279 N.E.2d 554 (1972).

¹⁹⁹*Id.* at 145-46, 279 N.E.2d at 555-56.

²⁰⁰365 N.E.2d at 785.

²⁰¹*Id.* at 785. IND. R. APP. P. 4(B) describes specific circumstances under which an interlocutory order may be appealed. Apparently, the court of appeals determined that the granting of a motion to intervene does not fall within any of the circumstances described in 4(B).

²⁰²IND. R. TR. P. 24(C).

²⁰³369 N.E.2d 427 (Ind. Ct. App. 1977).

²⁰⁴IND. R. APP. P. 4(B) provides in part: "[A]ppeal from interlocutory orders shall be taken to the Court of Appeals in the following cases:

(1) For the payment of money"

²⁰⁵369 N.E.2d at 432.

²⁰⁶*Id.* at 431. IND. R. TR. P. 54(B) provides in part:

A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

orders which would no longer be in effect after final judgment, such as preliminary injunctions, however, would not be subject to review after final judgment. The court stated that it would be a waste of time to consider an order which no longer had any practical effect, such as a temporary restraining order.²⁰⁷

In *Costanzi v. Ryan*²⁰⁸ the appellant failed, initially, to include an assignment of errors in the record for appeal as required by Appellate Rule 7.2(A)(1) and failed to file the record within thirty days of the ruling as required by Appellate Rule 3. The appellant, however, eventually placed an assignment of error and an amended table of contents in the record when the brief was filed. On appeal of the interlocutory order requiring the appellant to answer certain interrogatories, the court of appeals stated that the supreme court has inherent power to permit appeals after the time provided in the rules,²⁰⁹ and that the court of appeals, as a court created by the Indiana Constitution,²¹⁰ also has this inherent power.²¹¹ In addition, the appeals court said that the supreme court has granted the court of appeals a broad power to provide procedural steps for an appeal under Appellate Rule 4(B)(5).²¹² Consequently, where the other party will not be prejudiced by an appeal under Appellate Rule 4(B)(5), the appellate court can permit the appeal, notwithstanding any procedural errors by the appellant.²¹³ The appellee's motion to dismiss the appeal was dismissed.²¹⁴ Thus, the court distinguished the procedural requirements mandated by the Appellate Rules where an interlocutory appeal is taken of right from those where the appeal is taken pursuant to Appellate Rule 4(B)(5).

5. *Default Judgment on Appeal*—The Indiana Court of Appeals, in *Protective Insurance Co. v. Steuber*,²¹⁵ modified an earlier opinion in *Yerkes v. Washington Manufacturing Co.*²¹⁶ In *Yerkes* the court had said that the only way to appeal a default judgment was to file a motion under Trial Rule 60(B)²¹⁷ and to then appeal from the

²⁰⁷369 N.E.2d at 432.

²⁰⁸368 N.E.2d 12 (Ind. Ct. App. 1977).

²⁰⁹*Id.* at 16 (citing *State ex rel. Thomas v. Elkhart Cir. Ct.*, 228 Ind. 572, 94 N.E.2d 485, *cert. denied*, 340 U.S. 922 (1950)).

²¹⁰IND. CONST. art. 7, § 5.

²¹¹368 N.E.2d at 16.

²¹²*Id.*

²¹³*Id.* at 17.

²¹⁴*Id.* at 18.

²¹⁵370 N.E.2d 406 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 136-39 *supra* and accompanying text.

²¹⁶326 N.E.2d 629 (Ind. Ct. App. 1975), *modified by Protective Ins. Co. v. Steuber*, 370 N.E.2d 406, 408-09.

²¹⁷IND. R. TR. P. 60(B)(5) provides for relief from judgment, order, default, or proceeding.

trial court ruling on the 60(B) motion.²¹⁸ The first district court modified *Yerkes* to conform with the rules in the other districts of the court of appeals. The second²¹⁹ and the third districts²²⁰ of the court of appeals had held that appeal of a default judgment could be taken under Trial Rule 59²²¹ where an error of law was alleged. Thus, *Steuber* modified *Yerkes* to the extent that *Yerkes* did not permit an appeal of a default judgment under Trial Rule 59 where an error of law was alleged.²²²

6. *Appeal of Relief from Judgment.*—In *Logal v. Cruse*²²³ the Indiana Supreme Court adopted new procedures for disposition of a motion for relief from judgment while the judgment is on appeal.²²⁴ The supreme court noted that the time limit for the assertion of a Trial Rule 60(B) motion is significantly longer under the Indiana rules than the federal rules, and, thus, sufficient grounds for a 60(B) motion during appeal will probably be less frequent under the

²¹⁸326 N.E.2d at 633.

²¹⁹*Kelly v. Bank of Reynolds*, 358 N.E.2d 146 (Ind. Ct. App. 1976).

²²⁰*In re Marriage of Robbins*, 358 N.E.2d 153, 155 (Ind. Ct. App. 1976).

²²¹IND. R. TR. P. 59 provides for a motion to correct errors.

²²²370 N.E.2d at 408-09.

²²³368 N.E.2d 235 (Ind. 1977), *cert. denied*, 98 S.Ct. 1523 (1978). Other aspects of this case are discussed in notes 95-97 *supra* and accompanying text.

²²⁴*Id.* at 237. The procedures adopted were:

(1) The moving party files with the *appellate court* an application for leave to file his 60(B) motion. This application should be *verified* and should set forth the grounds relied upon in a *specific and nonconclusory manner*.

(2) The appellate court will make a preliminary determination of the merits of the movant's 60(B) grounds. In so doing the appellate court will determine whether, accepting appellant's specific, non-conclusory factual allegations as true there is a substantial likelihood that the trial court would grant the relief sought. Inasmuch as an appellate court is not an appropriate tribunal for the resolution of factual issues, the opposing party will not be allowed to dispute the movant's factual allegations in the appellate court.

(3) If the appellate court determines that the motion has sufficient merit, as described in the preceding paragraph, it will remand the entire case to the trial court for plenary consideration of the 60(B) grounds. Such remand order will terminate the appeal and the costs in the appellate court will be ordered taxed against the party procuring the remand. The decision to remand does not require the trial court to grant the motion. If the trial court denies the motion, the movant should file a motion to correct errors addressed to this denial, and appeal the denial. In this new appeal any of the issues raised in the original appeal may be incorporated, without being included in the second motion to correct errors.

(4) If the trial court grants the motion, the opposing party may appeal that ruling under the same terms as described in paragraph (3). The original appeal shall be deemed moot.

(5) If the appellate court denies the application for remand, that ruling may be assigned as grounds for rehearing and, where appropriate, transfer.

Id. (citations omitted).

Indiana Rules than the federal rules.²²⁵ Hence, the supreme court adopted the procedures of a minority of the federal courts which minimize disruption of the appellate process when a 60(B) motion is made while the judgment is on appeal.²²⁶

7. *Motion to Correct Errors.*—In the important case of *P-M Gas & Wash Co. v. Smith*,²²⁷ the Indiana Supreme Court approached a case which Justice Hunter called a “procedural nightmare.”²²⁸ Because of the confusion about the proper procedure at the trial and appellate court level, the court clarified the procedure to be followed in perfecting an appeal. The decision, the court said, was not dictum, but will control all future cases dealing with motion to correct errors.²²⁹

First, the court held that Trial Rule 59(D)²³⁰ applies *only* where a motion to correct errors is based upon evidence outside the record.²³¹ Trial Rule 59(D) is, thus, limited strictly to that situation.

The court also held that cross-appeals are governed by Trial Rule 59(G)²³² which considers a party to be a cross-appellant even though the party has not filed a motion to correct errors.²³³ If a party wishes to become a cross-appellant, he need only make that decision within sixty days after the entry of judgment as provided in Trial rule 59(C).²³⁴ The ruling on the motion to correct errors would then be his “complaint on the cross-appeals.”²³⁵

In addition, the court said that under Appellate Rule 4(A)²³⁶ a

²²⁵368 N.E.2d at 236-37.

²²⁶*Id.* at 236. See *Weiss v. Hunna*, 312 F.2d 711 (2d Cir. 1963), *cert. denied*, 374 U.S. 853 (1963).

²²⁷375 N.E.2d 592 (Ind. 1978).

²²⁸*Id.* at 593.

²²⁹*Id.* at 597-98.

²³⁰IND. R. TR. P. 59(D) provides in part: “When a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion.”

²³¹375 N.E.2d at 596 (citing 4 R. TOWNSEND & W. HARVEY, INDIANA PRACTICE 131 (1971)).

²³²IND. R. TR. P. 59(G) provides in part:

In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court.

²³³375 N.E.2d at 596.

²³⁴IND. R. TR. P. 59(C) provides: “A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment.”

²³⁵375 N.E.2d at 596.

²³⁶IND. R. APP. P. 4(A) provides in part: “Appeals may be taken by either party from all final judgments A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom.”

motion to correct errors is a final order, and that 4(A) is not inconsistent with Appellate Rule 2(A) or 7.2(A)(1).²³⁷ Thus, either party could appeal the ruling on a motion to correct errors. The court pointed out that Trial Rule 59(C) and 59(G) might suggest otherwise, but that they will be construed consistently with Appellate Rule 4(A).²³⁸ In so ruling, the Indiana Supreme Court overruled in whole or in part twelve opinions which held that a second motion to correct errors was required to appeal the ruling on a previous motion to correct errors.²³⁹

However, if a party wishes to raise an error which occurred at *trial*, or subsequently in a *verdict* or *judgment* (but not an error that was alleged in any motion to correct errors), then Trial Rule 59(C) would require the party to make a motion to correct errors.²⁴⁰ In essence, a party would be required to make no more than one motion to correct errors. If a motion to correct errors is required of a party, it could only be when that party is asserting an error that was not raised in a motion to correct errors.

In *Unishops, Inc. v. May's Family Centers, Inc.*²⁴¹ the court of appeals interpreted Trial Rule 53.1(A). Trial Rule 53.1(A) provides that a copy of the motion to correct errors shall be personally served upon the judge. The court of appeals held that a copy of the motion to correct errors must be served on the judge to "invoke a disqualification of the judge pursuant to TR 53.1(A), [but] it is not necessary to perfect filing of the motion to correct errors."²⁴²

²³⁷375 N.E.2d at 594 (citing *Grove, The Requirements of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977)).

²³⁸375 N.E.2d at 594-95.

²³⁹*Id.* at 594 (overruling *State v. Deprez*, 260 Ind. 413, 296 N.E.2d 120, 300 N.E.2d 341 (1973); *Campbell v. Mattingly*, 344 N.E.2d 858 (Ind. Ct. App. 1976); *Lake County Title Co. v. Root Enter., Inc.*, 339 N.E.2d 103 (Ind. Ct. App. 1975); *Minnette v. Lloyd*, 333 N.E.2d 791 (Ind. Ct. App. 1975); *Miller v. Mansfield*, 330 N.E.2d 113 (Ind. Ct. App. 1975); *Hansbrough v. Indiana Revenue Bd.*, 326 N.E.2d 599 (Ind. Ct. App. 1975); *Weber v. Penn-Harris-Madison School Corp.*, 317 N.E.2d 811 (Ind. Ct. App. 1974); *Wyss v. Wyss*, 160 Ind. App. 281, 311 N.E.2d 621 (1974); *Koziol v. Lake County Planning Comm'n*, 262 Ind. App. 343, 425 N.E.2d 374 (1974); *Easley v. William*, 161 Ind. App. 24, 314 N.E.2d 105 (1974); *State v. Kushner*, 160 Ind. App. 464, 312 N.E.2d 523 (1974); *Davis v. Davis*, 159 Ind. App. 290, 306 N.E.2d 377 (1974)).

²⁴⁰375 N.E.2d at 596.

²⁴¹375 N.E.2d 1135 (Ind. Ct. App. 1978).

²⁴²*Id.* at 1137-38.

IV. Constitutional Law*

A. Local Human Rights Commissions' Powers

One significant constitutional decision during the survey period was *Indiana University v. Hartwell*,¹ in which the Indiana Court of Appeals held unconstitutional the Indiana law² authorizing the creation of local human rights commissions. The 1978 General Assembly subsequently amended the law both to meet constitutional requirements and to limit the powers of the local commissions.³

Hartwell arose upon a challenge by Indiana University to a decision of the Human Rights Commission of the City of Bloomington. Hartwell had been employed by the University's Aerospace Research Applications Center (ARAC) from June 1, 1971, until May 1973. In June 1973, ARAC hired a man, Thor Semler, for a position similar to Hartwell's at a salary significantly higher than that paid to Hartwell. The Commission found that the University had discriminated against Hartwell by underpaying her because of her sex and granted her an award of back pay. The Monroe County Circuit Court found that the monetary award exceeded the commission's authority, but the court affirmed the rest of the order. The University appealed, alleging that the Commission had no authority to consider the discrimination charges, since the University was an arm of the state, and that the Commission's holdings were arbitrary and capricious. Hartwell and the Commission cross-appealed the ruling that the Commission lacked the statutory authority to award monetary damages.

The Indiana Court of Appeals found the Commission's findings of facts and the application of such findings to be unclear.⁴ The court

*For a discussion of two important due process cases decided during the survey period, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 38-42 (1978).

¹367 N.E.2d 1090 (Ind. Ct. App. 1977). For another discussion of this case, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 35-36 (1978).

²IND. CODE § 22-9-1-12 (1976) (repealed 1978). The court's ruling did not affect the validity of the remainder of the Indiana Civil Rights Law, IND. CODE §§ 22-9-1-1 to 13 (1976).

³Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1117 (codified at IND. CODE § 22-9-1-12.1 (Supp. 1978)).

⁴367 N.E.2d at 1091-92. The court held that the salary paid to Semler after June 1973, had no bearing on Hartwell's claim that she was subjected to sex discrimination by being underpaid for the period from May 1972 to May 1973. Semler's salary was paid after the time of the alleged discrimination and, therefore, is not relevant to whether Hartwell was underpaid during the earlier period. If the Commission had based its finding upon Semler's pay and duties, then its ruling would have been erroneous. *Id.* at 1092. The court, however did not reach this issue:

held the statute properly authorized the Commission to subject the state to its jurisdiction,⁵ but did not decide whether the University is an arm of the state of Indiana.⁶ The crucial issue in the case was whether the Commission had the power to award damages. The court held that the statute was broad enough to include that power, but that the very breadth of the statutory authority rendered the statute unconstitutional.⁷ The statute authorized units of local government to invest their human rights agencies with "such powers . . . as may be deemed necessary or appropriate to implement its purpose and objective, whether or not such powers are granted to the state commission . . .".⁸ Referring to the scope of powers given to the local commissions, the court held that the law was unconstitutional since "we cannot say with certainty that the statute places *any* limitations on the powers which may be granted to the Commission."⁹

The court then discussed the theory of the separation of governmental powers. The court found that the Commission was granted statutory authority which constitutionally belonged to the legislative and judicial branches of government and that such authority could not be delegated to an administrative agency.¹⁰ While acknowledging that the legislature may grant powers to administrative agencies in broad and general terms,¹¹ the court held that the human rights commission statute failed to meet the test im-

Although we suspect the above determination was the basis for the Commission's decision, the fact remains that we do not know how the Commission reached its decision

To facilitate an informed judicial review, we would remand and instruct the Commission to make clear, specific findings of fact and to state how they were applied. However, the questions of jurisdiction and of the authority of the Commission to award damages and our resolution of them renders unnecessary such a remand.

Id. at 1092-93.

⁵*Id.* at 1094. The court stated: "[W]e perceive nothing in the statute to preclude state government as it exists within such a territorial jurisdiction from being subjected to the jurisdiction of a local commission agency." *Id.*

⁶*Id.* at 1094 n.7.

⁷*Id.* at 1093.

⁸IND. CODE § 22-9-1-12 (1976). This broad language was followed by a list of specific powers which could be granted to local commissions. Local commissions were not, however, limited to the enumerated powers.

⁹367 N.E.2d at 1093. The significant constitutional provision, IND. CONST. art. 3, § 1, divides the powers of state government into the three departments of legislative, executive including administrative, and judicial. It then provides: "[N]o person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." *Id.*

¹⁰367 N.E.2d at 1094.

¹¹*Id.* at 1094 (citing *Matthews v. State*, 237 Ind. 677, 681-82, 148 N.E.2d 334, 336 (1958)).

posed by the Indiana Supreme Court in *Matthews v. State*:¹² "Reasonable standards must be imposed where the Legislature delegates discretionary powers to an administrative officer."¹³

The 1978 Indiana General Assembly restored the authority of local governments to establish human rights commissions on a basis consistent with the requirements in *Hartwell*.¹⁴ This statute limits the powers which can be exercised by local commissions. The local commissions are now denied any powers over the state or any of its agencies.¹⁵ The power to award damages, which had not been specifically granted under the invalid law, is now granted in a limited fashion by the new law.¹⁶ Another change is to make the jurisdiction of the state and local commissions exclusive. Under prior law, the state commission could refer cases to the local commissions.¹⁷ Under the new law, once a case is filed with either the local or state agency, the complainant has no recourse to the other agency.¹⁸

Although the authority for the creation of local commissions has been re-established on a basis consistent with constitutional requirements, a case such as that brought by *Hartwell* could no longer be heard by a local human rights commission because the complaint involves a state agency.

B. Recounts of Legislative Elections

The Indiana Supreme Court, in *State ex rel. Wheeler v. Shelby Circuit Court*,¹⁹ upheld the constitutionality²⁰ of a statute requiring a circuit court to appoint a recount commission upon the request of the apparent loser of an election to the Indiana General Assembly.²¹ *Wheeler* was distinguished from two prior cases, *State ex rel. Beaman v. Circuit Court of Pike County*,²² and *State ex rel. Acker v.*

¹²237 Ind. 677, 148 N.E.2d 334 (1958).

¹³*Id.* at 681, 148 N.E.2d at 336.

¹⁴Act of Mar. 7, 1978, Pub. L. No. 123, § 2, 1978 Ind. Acts 1117 (codified at IND. CODE § 22-9-1-12.1 (Supp. 1978)).

¹⁵IND. CODE § 22-9-1-12.1(b) (Supp. 1978). The Indiana Civil Rights Commission continues to have jurisdiction over discriminatory practices by the state. *Id.* § 22-9-1-3(h) (1976).

¹⁶*Id.* § 22-9-1-12.1(c)(8) (Supp. 1978). Payment of actual damages is allowed, but is limited to "lost wages, salaries, commissions, or fringe benefits." *Id.*

¹⁷*Id.* § 22-9-1-12 (1976) (repealed 1978).

¹⁸*Id.* § 22-9-1-12.1(d) (Supp. 1978).

¹⁹369 N.E.2d 922 (Ind.), *rev'd on rehearing* 362 N.E.2d 477 (Ind. 1977).

²⁰The issue was decided on the basis of IND. CONST. art. 4, § 10, which provides: "Each House, when assembled, shall . . . judge the elections, qualifications, and returns of its own members."

²¹IND. CODE §§ 3-1-27-1 to 17 (1976).

²²229 Ind. 190, 96 N.E.2d 671 (1951).

Reeves,²³ which had invalidated an earlier recount law regarding state legislative races.²⁴ The earlier law required the judgment of the trial court's recount commission to be accepted by the legislature as "prima facie evidence of the votes cast for such office."²⁵ After the earlier law was voided, the Indiana General Assembly amended the recount statute to provide that the results of a judicially-ordered recount be delivered

to the presiding officer of the house in which the successful candidate is to be seated . . . for such action as that body may find appropriate. . . .

The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted . . . for the purpose of referring the information therein contained to the appropriate authorities.²⁶

In *Acker*, the court had invalidated the recount statute as applied to a legislative race on the ground that the state constitution excluded the courts from jurisdiction over these elections.²⁷ In *Beaman*, the court held that the recount statute was unconstitutional because it purported to allow the courts "to determine the election, qualifications and returns of the members of the legislature . . .".²⁸

Writing for the majority in *Wheeler*,²⁹ Chief Justice Givan held that the recount was merely "an extension of the voting process,"³⁰ and that there was no judicial invasion of the legislative domain since "neither the original vote nor the recount are absolutely binding on the legislative body."³¹ The majority found that the legislative intent in amending the recount statute was to allow

²³229 Ind. 126, 95 N.E.2d 838 (1951).

²⁴Indiana Election Code Act of 1945, ch. 208, § 337, 1945 Ind. Acts 888.

²⁵*Id.*

²⁶IND. CODE § 3-1-27-14 (1976).

²⁷229 Ind. at 130, 95 N.E.2d at 840.

²⁸229 Ind. at 197, 96 N.E.2d at 674.

²⁹The initial supreme court decision in *Wheeler* held 3-2 that the recount violated the state constitution. After Justice Arterburn left the court and was replaced by Justice Pivarnik, the court reversed its earlier decision. Chief Justice Givan wrote a dissenting opinion in the first decision and the majority opinion in the second decision. Justice DeBruler wrote the majority decision in the first decision and the dissenting opinion in the second. To simplify consideration of the opinions, Chief Justice Givan's opinions will be referred to as the majority opinions, while those of Justice DeBruler will be referred to as the minority or dissenting opinions.

³⁰369 N.E.2d at 935.

³¹*Id.*

courts to participate in the recount process, while avoiding the constitutional infirmities of the prior statute.³²

The dissent stated that the court had failed to follow past case law,³³ and that the decision would "endanger a court's image of impartiality"³⁴ by involving the courts in political turmoil. The dissent argued that the amendment of the recount statute, enacted after *Acker and Beaman*, did not correct the unconstitutionality because, under both old and new law, the legislature still made the final determination of its members, and in both instances the courts were still required to participate in a process reserved by the Indiana Constitution to the legislative branch.³⁵ The dissent claimed that the crucial issue was not whether the court's actions had a binding effect upon the legislature, but whether the court had any role in the process of legislative elections. The minority countered the majority's position regarding the legislative intent in amending the statute by arguing that the legislature has no right to surrender its constitutional powers to the courts.³⁶

C. Indianapolis Massage Parlor Ordinance

The Indianapolis massage parlor ordinance³⁷ was upheld as constitutional by the Indiana Supreme Court in *City of Indianapolis v. Wright*.³⁸ The ordinance was challenged on three grounds. The first was that the city had attempted to pass a local law where a state law already pre-empted the area. The second was that the ordinance violated the due process or the equal protection provisions of federal or state law. The third was that the administrative inspection scheme authorized by the ordinance violated prohibitions in the federal or state constitutions.

The Indiana Supreme Court found that no state statute provided for the licensing of massage parlors and that the city ordinance did not provide for misdemeanor penalties;³⁹ consequently, the court held that the ordinance did not cover the same subject matter as

³²*Id.*

³³*Id.* (DeBruler, J., dissenting).

³⁴*Id.* at 936. (DeBruler, J., dissenting).

³⁵362 N.E.2d at 479.

³⁶*Id.*

³⁷INDIANAPOLIS-MARION COUNTY, IND. CODE § 17-729 (1975). The ordinance provides for detailed regulation of massage parlors. The persons employed by these establishments are prohibited from giving a massage to a person of the opposite sex, or from touching or offering to touch the genital or sexual area of any person. Those persons giving massages must wear nontransparent clothes over their sexual or genital areas.

³⁸371 N.E.2d 1298 (Ind. 1978).

³⁹*Id.* at 1300.

state statutes.⁴⁰ The massage parlor ordinance was thus distinguished from an ordinance invalidated in *City of Indianapolis v. Sablica*.⁴¹ That ordinance, prohibiting the interference with police officers, directly conflicted with Indiana constitutional provisions prohibiting the enactment of local laws "for the punishment of crimes and misdemeanors."⁴²

The second claim was that the ordinance violated the due process and equal protection clauses of the state⁴³ and federal⁴⁴ constitutions. The court rejected these claims, based on the United States Supreme Court's dismissal, for want of a substantial federal question, of appeals from three state court decisions upholding the constitutionality of similar massage parlor ordinances.⁴⁵ Under the Supreme Court's decision in *Hicks v. Miranda*,⁴⁶ such dismissals are to be treated as dispositions on the merits of the issues raised.⁴⁷ Subsequent to *Hicks*, federal appellate courts have considered similar massage parlor ordinances and affirmed their constitutionality based upon the summary dispositions.⁴⁸

The third claim was that the inspection provisions of the ordinance violated the prohibitions of the state⁴⁹ or federal⁵⁰ constitutions which protect against unreasonable search or seizure. The ordinance provided: "Every massage school, massage parlor, massage therapy clinic, or bath house shall be open for inspection during all business hours and at other reasonable times by police officers, health and fire inspectors and duly authorized representatives of the City Controller upon the showing of proper credentials by such persons."⁵¹

The court justified the warrantless search of a massage parlor on the grounds that surprise is necessary to avoid concealment of

⁴⁰*Id.*

⁴¹ 342 N.E.2d 853 (Ind. 1976) (invalidating INDIANAPOLIS-MARION COUNTY, IND. CODE §§ 10-1021, 10-1023 (1975)).

⁴²IND. CONST. art. 4, § 22. See also IND. CONST. art. 4, § 23.

⁴³IND. CONST. art. 1, § 12.

⁴⁴U.S. CONST. amend. XIV.

⁴⁵*Smith v. Keator*, 419 U.S. 1043 (1974), *dismissing appeal from* 285 N.C. 530, 206 S.E.2d 203 (1974); *Rubenstein v. Township of Cherry Hill*, 417 U.S. 963 (1974), *dismissing appeal from* No. 10,027 (N.J. Sup. Ct. Jan. 29, 1974) (unreported); *Kisley v. City of Falls Church*, 409 U.S. 907, *dismissing appeal from* 212 Va. 693, 187 S.E.2d 168 (1972).

⁴⁶422 U.S. 332 (1975).

⁴⁷*Id.* at 343-45.

⁴⁸*Tomlinson v. Mayor*, 543 F.2d 570 (5th Cir. 1976); *Hogge v. Johnson*, 526 F.2d 833 (4th Cir. 1975), cert. denied, 428 U.S. 913 (1976); *Colorado Springs Amusements v. Rizzo*, 524 F.2d 571 (3d Cir. 1975), cert. denied, 428 U.S. 913 (1976); *Cullinane v. Geisha House, Inc.*, 354 A.2d 515 (D.C. App.), cert. denied, 428 U.S. 923 (1976).

⁴⁹IND. CONST. art. 1, § 11.

⁵⁰U.S. CONST. amend. IV.

⁵¹INDIANAPOLIS-MARION COUNTY, IND. CODE § 17-729(j) (1975).

violations of the ordinance, that the business is one subject to an extensive history of regulation, that a regulated business impliedly consents to searches at reasonable times and places, and that the ordinance does not provide for criminal penalties.⁵² In the light of the cases cited by the court and the subsequent United States Supreme Court decision in *Marshall v. Barlow's, Inc.*,⁵³ the ruling on this issue is subject to serious challenge.

The massage parlors relied principally on the requirements for warrants for administrative searches in *Camara v. Municipal Court*⁵⁴ and *See v. City of Seattle*.⁵⁵ The former involved the right of building inspectors to make a warrantless inspection of a personal residence, while the latter involved a fire department inspector's warrantless inspection of a locked warehouse. In *Camara*, the Court required administrative searches to adhere to the requirements of the fourth amendment,⁵⁶ but held that the standard of probable cause required for warrants would be less stringent for administrative searches than that applied in criminal cases.⁵⁷ In *Colonnade Catering Corp. v. United States*,⁵⁸ the Court held that Congress had the power to authorize warrantless administrative searches under the liquor laws, but that, absent clear authorization, the warrant requirements of the fourth amendment were fully applicable.⁵⁹ *Colonnade* was limited to laws regulating the liquor industry, which has a history of substantial and pervasive federal regulation.⁶⁰ The Court found similarly exempt from the warrant requirement businesses engaged in selling weapons and ammunition, in *United States v. Biswell*,⁶¹ stating:

Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is

⁵²371 N.E.2d at 1302.

⁵³96 S. Ct. 1816 (1978).

⁵⁴387 U.S. 523 (1967).

⁵⁵387 U.S. 541 (1967).

⁵⁶387 U.S. at 534.

⁵⁷*Id.* at 538-39. The Court reached the same conclusion in *See v. City of Seattle*, 387 U.S. at 546.

⁵⁸397 U.S. 72 (1970).

⁵⁹*Id.* at 76-77.

⁶⁰*Id.* at 75-76. The Court stated:

What was said in *See* reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. We deal here with the liquor industry *long subject to close supervision and inspection*. As respects that industry . . . Congress has broad authority to fashion standards of reasonableness for searches and seizures.

Id. at 77 (emphasis added).

⁶¹406 U.S. 311 (1972).

undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders.⁶²

The Indiana court acknowledged that massage parlors have not been as pervasively regulated as liquor or gun businesses, but argued that under *Biswell* "a licensee does impliedly consent to inspections at any and all reasonable times and places by obtaining a license."⁶³ This pronouncement overstates the holding of *Biswell* which tied such consent to a decision "to engage in this pervasively regulated business and to accept a federal license," rather than to a decision to engage in any business requiring a license.⁶⁴

Subsequent to the Indiana decision in *Wright*,⁶⁵ the United States Supreme Court again addressed the issue of warrantless administrative searches in *Marshall v. Barlow's, Inc.*,⁶⁶ a case challenging warrantless searches of business premises pursuant to the Occupational Safety and Health Act (OSHA).⁶⁷ In *Barlow's*, the Court indicated that "the closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception."⁶⁸ That a business is subject to minimum wages and maximum hours legislation,⁶⁹ is engaged in interstate commerce, or is subject to the National Labor Relations Act⁷⁰ is not sufficient regulation to include that business in the category of "pervasively regulated."⁷¹ While *Barlow's* does not clearly indicate whether *Colonnade* and *Biswell* should be extended to licensed massage parlors, it does suggest that the Court is hesitant to extend the exception to the warrant requirement far beyond the situations in those cases.

Another factor relied upon by the Indiana Supreme Court in *Wright* was that a requirement of warrants before search would be unreasonable under the fourth amendment because of "the ease with which some violations could be concealed."⁷² However, the United States Supreme Court held in *Barlow's* that requiring warrants for OSHA searches would not make inspections less effective even though the OSHA Act "regulates a myriad of safety details that may be amenable to speedy alteration or disguise"⁷³

⁶²*Id.* at 315.

⁶³371 N.E.2d at 1302 (construing *United States v. Biswell*, 406 U.S. 311 (1972)).

⁶⁴406 U.S. at 316.

⁶⁵371 N.E.2d 1298 (Ind. 1978).

⁶⁶98 S. Ct. 1816 (1978).

⁶⁷29 U.S.C. § 657(a) (1976).

⁶⁸98 S. Ct. at 1821.

⁶⁹41 U.S.C. § 35 (1976).

⁷⁰29 U.S.C. §§ 151-269 (1976).

⁷¹See 98 S. Ct. at 1820.

⁷²371 N.E.2d at 1302.

⁷³98 S. Ct. at 1822.

Even if a warrant requirement were held applicable to massage parlors, such warrants are easily obtainable. The criminal law standard of probable cause is not applicable to the issuance of warrants for administrative searches.⁷⁴ Under *Barlow's*, for administrative searches "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'"⁷⁵ This diluted fourth amendment warrant requirement allows authorities to easily obtain warrants for administrative searches. Under this standard, the practical effect of overruling *Wright* by requiring warrants before searches of massage parlors would be minimal.

D. Freedom of Religion

In *Church of Christ v. Metropolitan Board of Zoning*,⁷⁶ the Indiana Court of Appeals held that the exclusion of a church from a residentially-zoned area is a violation of the fundamental right of freedom of worship⁷⁷ protected by the United States⁷⁸ and Indiana Constitutions.⁷⁹

The case involved the Church of Christ's purchase of property with a residential classification of "D-5."⁸⁰ Churches were clearly excluded from this classification. The Church's application, seeking permission to construct off-street parking adjacent to their property, was denied by the Metropolitan Board of Zoning Appeals. The Church appealed, contending that the Board illegally denied its application because churches could not constitutionally be excluded from residential areas by zoning ordinances. The Board argued that, although the zoning ordinance did prohibit the establishment of a church in the area, this prohibition was not illegal because the zoning ordinance precluded only the primary usage of the property for church purposes. According to the Board, the Church members could meet for religious purposes in the residential structure located on the property, but to permit the Church to construct parking places would transform the structure into one primarily used as a church and, thus, would be in conflict with the ordinance.

⁷⁴*Id.* at 1824.

⁷⁵*Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)).

⁷⁶371 N.E.2d 1331 (Ind. Ct. App. 1977).

⁷⁷*Id.* at 1333.

⁷⁸U.S. CONST. amend. I & XIV.

⁷⁹IND. CONST. art. I, § 2.

⁸⁰The "D-5" designation limited permitted use to primarily one- and two-family dwellings and certain home occupations. INDIANAPOLIS-MARION COUNTY, IND. CODE app. D., pt. 4, ch. II, §§ 2.00, 2.06 (1975).

The majority held that the ordinance unconstitutionally infringed on the Church's right of freedom of worship.⁸¹ The court stated that since 1954 the Indiana Supreme Court has followed "the principle that the building of a church may not be prohibited in a residential district . . ."⁸² The court recognized "that churches are subject to such reasonable regulations as may be necessary to promote the 'public health, safety, or general welfare,'" but concluded that restrictions that are tantamount to exclusion are not reasonable.⁸³

The court characterized the city's refusal to permit the Church to use their property for religious purposes as the "classic confrontation" between the exercise of the police power and a fundamental constitutional right.⁸⁴ In holding the ordinance unconstitutional as applied to churches, the court apparently adopted the balancing test set forth in *Board of Zoning Appeals v. Jehovah's Witnesses*.⁸⁵ The test requires a balancing of the state interest in promoting the public welfare with the individual's right to freedom of religion.⁸⁶ Under this balancing test, the *Jehovah's Witnesses* court held that zoning restrictions establishing setback or front yard lines are reasonable restrictions on the right of freedom of religion,⁸⁷ but that avoidance of the hazard of increased traffic was an insufficient public interest to justify totally excluding churches from residential areas.⁸⁸ Similarly, in *Board of Zoning Appeals v. Schulte*,⁸⁹ the court held that prevention of depreciation in value of adjoining property is not a sufficient public interest to justify the total exclusion of churches.⁹⁰ The Indiana Courts of Appeal have also followed this ap-

⁸¹371 N.E.2d at 1333.

⁸²*Id.* at 1334 (citing *Board of Zoning Appeals v. Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954)).

⁸³371 N.E.2d at 1334 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

⁸⁴371 N.E.2d at 1334. The court explained: "If the citizen fails to heed Wendell Phillip's admonition that 'External Vigilance is the price of liberty,' encroaching government may devour that fundamental right (and what is more fundamental than freedom of religion, which is a vital part of freedom of thought?)." *Id.*

⁸⁵233 Ind. 83, 117 N.E.2d 115 (1954).

⁸⁶The *Jehovah's Witnesses* court stated the balancing test as follows:

When, under the facts in this case, the welfare and safety of the people in the neighborhood is placed in the scales of justice on one side, and the right to freedom of worship and assembly is placed on the other, the balance weighs heavily on the side guaranteeing the right to peaceful assembly and to worship God according to the dictates of conscience, regardless of faith or creed.

Id. at 92, 117 N.E.2d at 121.

⁸⁷*Id.* at 89-90, 117 N.E.2d at 118.

⁸⁸*Id.* at 92, 117 N.E.2d at 121.

⁸⁹241 Ind. 339, 172 N.E.2d 39 (1961).

⁹⁰*Id.* at 351, 172 N.E.2d at 45.

proach. Thus, in *Keeling v. Board of Zoning Appeals*,⁹¹ the court permitted the Methodist Church to operate in a residential area despite the "D-5" classification.⁹² In *Board of Zoning Appeals v. Wheaton*,⁹³ a Catholic Sisters home was allowed in a residential district.⁹⁴

The court's decision is well supported in Indiana case law. Indeed, it is consonant with the approach taken in most jurisdictions.⁹⁵ While the United States Supreme Court has not spoken to the zoning issue, it has established a more precise balancing test for free exercise cases.⁹⁶ The test requires the persons claiming an exemption to show that the state regulation burdens their practice of religion. Since the restriction impinges on a fundamental right, the state must show that its action is justified by a compelling interest.⁹⁷ That is, the state must be promoting an important interest which can not be achieved in a less restrictive manner.⁹⁸

The Court has also recognized that churches are subject to such reasonable regulations as are necessary to promote the public health, safety, or general welfare.⁹⁹ Apparently, such regulations are

⁹¹117 Ind. App. 314, 69 N.E.2d 613 (1946).

⁹²*Id.* at 328, 69 N.E.2d at 618. The court stated: "[T]he right to erect and use a modern church building may in a proper case . . . include a parking lot for the use of the members in attending church services and any meetings held by the church . . ." *Id.*

⁹³118 Ind. App. 38, 76 N.E.2d 597 (1948).

⁹⁴*Id.* at 48, 76 N.E.2d at 601-02.

⁹⁵See Annot., 74 A.L.R.2d 377 (1960). See also cases discussed in 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.19 (1968); 3 E. YOKLEY, ZONING LAW AND PRACTICE § 28-14 (3d ed. 1967 & Supp. 1977). Only in California and Florida have the courts upheld zoning ordinances which exclude churches from residential areas. See *Minney v. Azusa*, 164 Cal. App. 2d 12, 330 P.2d 255 (1958); *Miami Beach United Lutheran Church v. City of Miami Beach*, 82 So. 2d 880 (Fla. 1955).

⁹⁶*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁹⁷*Sherbert v. Verner*, 374 U.S. at 403.

⁹⁸The court explained the compelling interest test in *Braunfeld* as follows:

[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

366 U.S. at 607. The test was expressed similarly in *Yoder*: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. The state, of course, is absolutely prohibited under the amendment from regulating or prescribing religious belief. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638-39 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Thus, the compelling interest test is applicable only when the state, in regulating conduct by such methods as zoning ordinances, burdens the practice of religion.

⁹⁹*West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 306, 307 (1940).

ones which pass the balancing test described above. Thus, in *Braundfeld v. Brown*,¹⁰⁰ the Court held that Sunday closing laws were reasonable regulations as applied to Orthodox Jews despite the fact that they observed another day as the Sabbath.¹⁰¹ On the other hand, in *Wisconsin v. Yoder*,¹⁰² the Court held that reasonable regulations did not include a state statute requiring Amish children to attend public school after the eighth grade.¹⁰³ Furthermore, the Court, in *Sherbert v. Verner*,¹⁰⁴ held that reasonable regulations could not include denial of unemployment benefits to a Seventh Day Adventist because her religious beliefs required her to refuse work on Saturday.¹⁰⁵

If the Supreme Court test had been applied in *Church of Christ*, the result, in all likelihood, would have been the same. The burden placed on the Church is not as great as was placed on the Amish in *Yoder*. The regulation in *Yoder* required the Amish to either violate their religious tenets or to suffer criminal sanction.¹⁰⁶ The burden in *Church of Christ* is less direct; the burden was not on the Church's religious beliefs, but on the geographical areas where it was permitted to practice those beliefs. It is doubtful, however, that the Zoning Board could establish that excluding the Church from a residential area promotes a sufficiently important state interest. To the contrary, most authorities express the belief that, notwithstanding the problem incident to increased traffic, the presence of churches in residential areas contributes to the general welfare of the community.¹⁰⁷

According to the majority, there is a constitutionally permissible way to exclude churches.¹⁰⁸ The court stated that churches could be excluded from residential areas by the use of restrictive covenants between property owners which impose the appropriate servitudes on land.¹⁰⁹ The judiciary, of course, would be the vehicle for enforcing the restrictive covenants.

The issue raised by this dicta is whether it conflicts with the Supreme Court's decision in *Shelley v. Kraemer*.¹¹⁰ *Shelley* involved the attempted sale of land to a member of a racial minority. The

¹⁰⁰366 U.S. 599 (1961).

¹⁰¹*Id.* at 603-06.

¹⁰²406 U.S. 205 (1972).

¹⁰³*Id.* at 213-14.

¹⁰⁴374 U.S. 398 (1963).

¹⁰⁵*Id.* at 410.

¹⁰⁶406 U.S. at 218.

¹⁰⁷See 2 R. ANDERSON, *supra* note 95, § 9.19; 3 E. YOKLEY, *supra* note 95, § 28-14.

¹⁰⁸371 N.E.2d at 1334.

¹⁰⁹*Id.* (quoting *Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 349, 172 N.E.2d 39, 43 (1961)).

¹¹⁰334 U.S. 1 (1948).

land had been encumbered by a restrictive covenant which forbade its sale to such minorities. The Supreme Court stated that, so long as the agreements were voluntarily enforced, there was no "state action" and, therefore, no constitutional infringement,¹¹¹ but concluded that the judicial enforcement of these restrictive agreements was a violation of the fourteenth amendment.¹¹²

In light of *Shelley*, the majority's statement will not withstand constitutional scrutiny. The use of restrictive covenants to exclude churches from residential areas is clearly analogous to the method attempted in *Shelley*. In both situations the court is requested to enforce agreements which, except for the absence of state action, are violative of constitutional protections. Thus, the judicial enforcement of restrictive covenants totally excluding churches from residential areas is an infringement of the right to religious freedom.

ALAN RAPHAEL*

V. Contracts, Commercial Law and Consumer Law

*Harold Greenberg***

A. Contracts; Covenants Not To Compete.

The validity of an employment agreement containing a covenant not to compete was sustained by the court of appeals in *Advanced Copy Products, Inc. v. Cool*.¹ Late in 1971, six months after the employee had begun work as a copying machine sales and service representative, the employer and employee executed a written agreement which contained a covenant not to compete with the employer for one year, the employment being terminable at will by either party. In 1973, the parties executed a new agreement which contained the same terms except: (1) The covenant not to compete

¹¹¹*Id.* at 13.

¹¹²*Id.* at 20. The court stated: "It is clear but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.* at 19. Thus, those who seek judicial enforcement of racially restrictive covenants will be imbued with state action so as to bring the covenants within the scrutiny of the fourteenth amendment.

*The author wishes to extend appreciation to Gary Harter for his assistance in the preparation of this discussion.

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¹363 N.E.2d 1070 (Ind. Ct. App. 1977).

was extended to five years and limited to eleven Indiana counties, and (2) either party could terminate upon thirty-days notice. The employee subsequently left the employer for a job with a competitor, and the employer brought suit to enforce the covenant.

The trial court granted summary judgment in favor of the employee on the ground that the covenant was not supported by adequate consideration. More specifically, the court found the employee's continued employment was not dependent on his signing of the new agreement. Consequently, the continued employment did not constitute consideration. With this particular finding, the court of appeals agreed.² However, the appellate court did not agree with the trial court that the additional thirty-day notice provision was also inadequate as consideration. Rather, the appellate court found the added provision did constitute consideration sufficient to support the covenant. Accordingly, the court reversed and remanded the matter for further proceedings.³

The court of appeals also found sufficient consideration to support a covenant not to compete in *4408, Inc. v. Losure*,⁴ in which the principal issue was the reasonableness of the covenant. The employee had worked as a coffee service salesman from 1967 to 1974 when he resigned rather than sign a covenant not to compete. The employee returned in 1975 and signed a new employment agreement in which he agreed not to compete in the coffee service business for a period of three years "only in the areas of his past, present and future employment with [the employer]."⁵

As the court itself expressed:

The concept of "reasonableness" has assumed increased importance in cases involving covenants not to compete. . . . In determining whether or not a covenant not to compete is reasonable, the court considers, in the circumstances of each case, the legitimate interests of the employer which might be protected by the covenant and the protection granted by the covenant in terms of time, space, and the types of activity proscribed.⁶

²*Id.* at 1071. Because of this finding, the court of appeals was able to avoid the question whether continued employment of the employee constituted sufficient consideration for a covenant not to compete when the terms of the employment remain unchanged. The court stated that the law on this point "is unclear." *Id.* In some states, e.g., Pennsylvania, it is quite clear that continued employment (coupled with a threat of termination) is not sufficient consideration to sustain such a covenant. See, e.g., *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 471 Pa. 1, 10-11, 369 A.2d 1164, 1168-69 (1977), and cases cited therein.

³363 N.E.2d at 1072.

⁴373 N.E.2d 899 (Ind. Ct. App. 1978).

⁵*Id.* at 900.

⁶*Id.*

Although an employer is not entitled to protection from the employee's use of his own knowledge, skill, or information (other than trade secrets and confidential information), the employer is entitled to protect the good will of its business. The protection is allowed when good will is created by the contact and personal relationship of the employee with the employer's customers, and is particularly enforced as to businesses in which the competition is intense and there is little practical difference between competitors.

The contract in *Losure* was drafted so as to limit the employee's competitive activities only in those areas where the employee had worked and had established customer contacts. Thus, this covenant was dissimilar to those covenants found to be unreasonable because they contained no geographical limits or attempted to impose limits beyond the area in which the employee worked.⁷ Further, the three-year duration was found to be reasonable under the circumstances.

The obvious lesson from these cases is that if the employer carefully limits the scope and duration of the restriction and requires the covenant as part of a new agreement, the covenant will be enforced by the courts. The terms of the new agreement should differ in some material way from the existing terms of employment. An overreaching employer, however, may be held to have no restriction whatsoever.

B. Commercial Law

1. *Breach of Warrant by a Financing Seller.*—*Thompson Farms, Inc. v. Corno Feed Products*,⁸ dealt with several significant issues under article 2 of the Uniform Commercial Code (U.C.C.):⁹ (1) Whether a secured financing agency could also be a seller, (2) whether the on-site construction and sale of hog houses constituted a sale of goods, (3) whether the buyer was required to plead notice of alleged defects, and (4) whether the transaction involved express warranties or implied warranties of merchantability and of fitness for a particular purpose which might have been breached.

As a promotional device to increase sales of its livestock feed products, Corno developed a hog-marketing plan which included financing for the producer and blueprints for a specially designed, time and labor saving hog house.¹⁰ Corno made no profit from the

⁷See *Donahue v. Permacel Tape Corp.*, 234 Ind. 398, 127 N.E.2d 235 (1955); *Struever v. Monitor Coach Co.*, 156 Ind. App. 6, 294 N.E.2d 654 (1973).

⁸366 N.E.2d 3 (Ind. Ct. App. 1977). For a discussion of the agency aspects of this case, see *Corporations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 94, 94 n.1 (1978).

⁹U.C.C. §§ 2-101 to 725. All sections hereafter cited to the U.C.C. are also found in IND. CODE, title 26 (1976 & Supp. 1978).

¹⁰The houses, called "Corno Low Cost Pork Finishing Units," had slatted floors and walls, and were to be built over a lagoon. It was estimated by Corno that by keep-

sale of the hog houses themselves, but, apparently, earned its profits from the sale of feed required to be purchased by any producer who financed with Corno a purchase of the hog houses. A local distributor was appointed to furnish the hog houses according to Corno's plan and blueprints.

Corno's field representative presented a sales brochure, the marketing plan, and the blueprints to Thompson Farms, which agreed to enter the hog production business and to buy two hog houses with Corno financing. The local distributor hired the crew and purchased the materials for construction, but Corno's own employees periodically inspected the construction, solved problems, gave instructions to proceed, approved changes, and ultimately approved the final specifications upon completion. Corno and Thompson Farms then entered "Installment Sale and Security Agreements" which gave Corno security interests in the hog houses. Corno's checks were drawn to the distributor and Thompson Farms.¹¹

The hog houses proved to be cold, wet, and drafty. Despite attempted modifications, approximately twenty-five percent of the 2,000 young pigs placed in the houses died of pneumonia and dysentery. Labor on the units consumed far more man-hours per day than the one-hour per day represented by Corno in its original sales presentation.

When Thompson Farms refused to make any further payments to Corno, Corno sued for the amount due. Thompson Farms counterclaimed, *inter alia*, for breaches of express warranties and of the implied warranties of merchantability and of fitness for a particular purpose.¹² The trial court, however, ruled adversely to Thompson Farms on all its affirmative defenses and counterclaims.

a. *The Secured Financing Agency as Seller.*—In an effort to avoid liability as a seller, Corno contended that it was only a financing agency, not the seller of the hog houses, and that Thompson Farms could look only to the distributor for relief.¹³ The appellate

ing a large number of hogs in a small place, only about an hour a day would be needed to feed and check them. 366 N.E.2d at 7.

¹¹Like Corno, the distributor made no profit from the sale of the hog houses. The price charged to Thompson Farms equalled the cost of materials and labor without any profit. *Id.* at 11.

¹²*Id.* at 5. Thompson Farms also included claims based on negligence and strict liability in tort. These claims are not discussed by the court in its majority holding.

¹³See *In re Sherwood Diversified Indus., Inc.*, 382 F. Supp. 1359 (S.D.N.Y. 1974); *Atlas Indus., Inc. v. National Cash Register Co.*, 216 Kan. 213, 531 P.2d 41 (1975), cited in *Thompson Farms, Inc. v. Corno Feed Prods.*, 366 N.E.2d at 13. In *Sherwood Diversified Industries* and *Atlas Industries*, an equipment lessee selected equipment which was shipped directly to his place of business by the manufacturer but was paid for by the lessor who took a security interest in the equipment and collected monthly

court determined: “[A] finding that Corno acted as a financing agency does not preclude a finding that Corno is also a seller.”¹⁴ The facts showed that Corno’s own sales representative directly solicited Thompson Farms and that he or his department was directly involved in the construction. This situation led the court to conclude that Corno’s sales department was responsible for the sale. Moreover, the court found, as a matter of law, that the distributor was Corno’s agent, thereby making Corno responsible as a principal and as seller of the hog houses.¹⁵ Thus, the transaction was both a secured transaction and a sale, and Corno was liable as a seller.

b. “*Goods*” under Article 2.—Having concluded that the transaction was a sale, and since, in its judgment, the warranty provisions of article 2 of the U.C.C. apply only to sales of goods,¹⁶ the court was next required to determine if the hog houses constituted goods, i.e., were they movable at the time of identification to the contract.¹⁷ In the loan agreement, the parties had referred to the hog houses as “equipment” (along with feeders, bins, and waterers), which was not to be abused or misused and could be repossessed, and Thompson Farms had paid a single price for each hog house. Furthermore, the court observed that Indiana courts had already considered a mobile home, electricity, and a car washing center to be goods,¹⁸ as had the Court of Appeals for the Seventh Circuit with

payments from the lessee. The lessor had nothing to do with the selection and merely paid the manufacturer, took title, and entered a lease with the lessee. In both cases, the transactions were considered sales by the manufacturer directly to the lessee, with the lessor occupying the position of financing agency rather than that of seller. See U.C.C. § 2-104(2).

¹⁴366 N.E.2d at 13 (footnote omitted).

¹⁵*Id.* at 12-13.

¹⁶366 N.E.2d at 14-15. The court did note several cases from other jurisdictions which have applied the U.C.C. to transactions analogous to a sale, but it did not reach this issue because of the finding that a sale did, in fact, take place in this case. See *id.* at 14 n.9. The concurring and dissenting opinion disagreed with the court’s determination that there was a sale of goods within the coverage of the U.C.C. *Id.* at 19-20 (Garrard, J., dissenting in part).

¹⁷U.C.C. § 2-105(1) states:

“*Goods*” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. “*Goods*” also include the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-107(1) essentially provides that a contract for sale of a structure to be removed from realty by the seller is a contract for the sale of goods. A finding that the hog houses were “goods,” therefore, was not inconsistent with the Code.

¹⁸Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976) (mobile home); Helvey v. Wabash County REMC, 151 Ind. App. 176, 278 N.E.2d 608 (1972) (electricity); Abbott v. Thompson, 148 Ind. App. 25, 263 N.E.2d 733 (1970) (car washing equipment). The

regard to a one-million-gallon water tank to be assembled in place.¹⁹ The hog houses, therefore, were held to be goods.²⁰

c. *Notice of Defect.*—Section 2-607(3)(a) of the U.C.C. requires: “[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . .”²¹ Consistent with decisions in other jurisdictions²² and with the Official Comment to section 2-607, the court held that the required notice is a substantive condition precedent so that the party claiming breach of warranty must allege that notice of defect was given.²³ Thompson Farms had satisfied this requirement.²⁴ The court declared that Corno's general denial was not sufficient to put the question of notice in issue under Trial Rule 9(C) which requires a specific denial of a properly pleaded condition precedent.²⁵

d. *Express and Implied Warranties.*—The court reiterated the rule that implied warranties are not *made*; they are implied by law for the protection of the buyer and must be liberally construed.²⁶ The court specifically found that an implied warranty of fitness for a particular purpose under U.C.C. section 2-315 did exist because Corno knew the particular purpose for which Thompson Farms intended to use the hog houses and, in fact, had told Thompson Farms how to use them.²⁷ Whether this implied warranty had been breached and the damages arising therefrom were facts to be determined by the trial court on remand.²⁸

Abbett court was not required to rule on the “goods” issue because the parties agreed the U.C.C. governed the transaction and that the only real issue was revocation of acceptance. The written agreement between Corno and Thompson Farms, describing the hog houses as equipment which could be repossessed, may have been the factor which weighed most heavily.

¹⁹Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) (applying Illinois law).

²⁰366 N.E.2d at 16.

²¹U.C.C. § 2-607(3)(a).

²²Page v. Camper City & Mobile Home Sales, 292 Ala. 562, 297 So. 2d 810 (1974); L.A. Green Seed Co. v. Williams, 246 Ark. 463, 438 S.W.2d 717 (1969); Winter v. Honeggers' & Co., 215 N.E.2d 316 (Iowa 1974); Annot., 53 A.L.R.2d 270 (Supp. 1976), cited in Thompson Farms, Inc. v. Corno Feed Prods., 366 N.E.2d at 16.

²³366 N.E.2d at 17.

²⁴In its counterclaim, Thompson Farms had alleged, “That the plaintiff was duly notified of the defects in said hog houses and of the breach of express warranty and implied warranties, but Plaintiff has failed to make the said hog houses conform to said warranties.” *Id.*

²⁵*Id.*

²⁶*Id.* at 18 (citing Woodruff v. Clark County Farm Bureau Coop., 153 Ind. App. 31, 42, 286 N.E.2d 188, 194 (1972)).

²⁷*Id.* at 18-19.

²⁸On the issue of express warranty, the court was unable to determine from the record whether the trial court had found that no express warranty existed because it

2. *Warranty of Title.*—In *McDonald's Chevrolet, Inc. v. Johnson*,²⁹ the court found that the defendant-seller had void, rather than voidable, title to a motor home and that, therefore, the seller had violated the warranty of title mandated by section 2-312(1)(a).³⁰ Murphy rented the motor home from its owner in Texas for thirteen days, immediately left the state, obtained titles to the motor home in Alabama and Nebraska, and ultimately used it as a trade-in on a truck purchased from McDonald's in Indiana. Johnson purchased the motor home from McDonald's, only to have it seized by the police thirteen months later.

McDonald's contended that it was a good faith purchaser from Murphy who possessed voidable title under section 2-403 of the U.C.C.³¹ and that it thereby acquired good title which it transferred to Johnson. After an analysis of the term "voidable title," which is not defined in the U.C.C., the court held that Murphy's title was void and that the warranty of title had been breached.³²

An alternative the court could have followed, and which would have avoided the need to distinguish between void and voidable title, would have been to find that the warranty of title includes a warranty of quiet possession, which the Indiana and Official Comments to section 2-312 state it does, and that Johnson's quiet possession was interrupted.³³

3. *Assignments.*—In *First National Bank v. Schrader*,³⁴ the

had earlier found that there had been no sale or merely that there had been no express warranty. Similarly, the trial court had not determined whether Corno was a "merchant," which is one of the requirements for the existence of an implied warranty of merchantability. U.C.C. § 2-314. Both issues would be determined on remand.

Judge Garrard, who refused to characterize the transaction as a sale of goods, would have found that no warranties under the U.C.C. applied, but would have remanded for a finding as to the existence of express warranties under general contract principles. 366 N.E.2d at 20-21 (Garrard, J., concurring in part).

²⁹376 N.E.2d 106 (Ind. Ct. App. 1978).

³⁰*Id.* at 109.

³¹U.C.C. § 2-403 states:

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser; or

...

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

³²*Id.* at 108-09.

³³See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-11 (1972).

³⁴375 N.E.2d 1124 (Ind. Ct. App. 1978).

court was asked to hold that the assignment of a retail installment contract for the purchase of a used car was governed by the formal requirements of articles 3 and 9 of the U.C.C. Not so, replied the court.³⁵ Article 3³⁶ is restricted to negotiable instruments, *i.e.*, drafts, checks, notes, and certificates of deposit, and article 9³⁷ covers secured transactions. This transaction involved neither a negotiable instrument nor a secured creditor. It was a simple transaction in goods under article 2, section 210, which provides for assignment of contracts unless otherwise agreed. In the absence of such agreement, there are no formalities required to validate the assignment.

4. *Accommodation Parties; Tender of Payment.*—In *Stockwell v. Bloomfield State Bank*,³⁸ a borrower's application for a loan was denied for lack of security, but was subsequently approved when the Stockwells also agreed to sign the note.³⁹ When the note came due, a second note was prepared and "co-signed by" the Stockwells. That note was succeeded by a third note on which the bank ultimately brought suit for principal, interest, and attorneys' fees. The Stockwells tendered principal and interest but refused to pay the fees. As defenses, they alleged failure of consideration, impairment of collateral, and tender of payment which terminated their liability.

The court first found that the Stockwells were accommodation parties under section 3-415 of the U.C.C.⁴⁰ They had lent their names so that the borrower could obtain the loan, and they received only indirect benefit from the funds which were paid directly to the borrower. Further, Stockwell wrote "co-signed by" before signing the second note. While no single factor controlled, the entire transaction showed clearly that the Stockwells were accommodation parties.⁴¹

The finding that the Stockwells were accommodation parties rather than co-makers had a direct effect on the defenses available to them. In particular, failure of consideration was not available since no separate consideration need run to an accommodation party. The accommodation party's consideration is the primary obligor's receipt of the proceeds of the loan.

The court found it unnecessary to determine if the tender without attorneys' fees was sufficient to discharge the Stockwells

³⁵*Id.* at 1125.

³⁶U.C.C. §§ 3-101 to 121.

³⁷*Id.* §§ 9-101 to 507.

³⁸367 N.E.2d 42 (Ind. Ct. App. 1977).

³⁹The Stockwells had leased a building to the borrower for the operation of a business.

⁴⁰U.C.C. § 3-415 provides, in pertinent part: "(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

⁴¹367 N.E.2d at 45.

under section 3-604, since a proper tender must be kept open if refused. The failure of the Stockwells to pay the amount tendered into court rendered the defense ineffective.⁴²

5. *Bills of Lading: Claims and Damages.*—In *Midwest Emery Freight System, Inc. v. IMC, Inc.*,⁴³ a consignor's goods, shipped on January 20, 1972, were rejected by the consignee shortly after delivery on January 21, 1972, and were returned to the carrier for redelivery to the consignor. The shipment was left by the carrier at a truckstop, and the redelivery to the consignor was not attempted until approximately eighteen months later, in August 1973. The consignor had filed a claim for the lost goods in November 1972, and refused the August 1973 delivery because the goods had deteriorated to less than scrap value. The consignor's claim for damages was filed in November 1973.

The original bill of lading provided that claims for loss, damage, or delay would be precluded unless filed with the carrier, in writing, within nine months after delivery. The appellate court rejected the carrier's argument that the first claim had been filed more than nine months after the January 1972 delivery. The trial court had ruled that, when the goods were rejected by the consignee and returned to the carrier for redelivery, a new contract of carriage had been created under which no delivery had been attempted until August 1973. The finding of a new contract was not challenged by the carrier and was, therefore, binding upon it, thereby making the 1972 delivery irrelevant to the case.

On the issue of damages, the appellate court agreed that the consignor was entitled to lost profits because the returned goods had been totally damaged as a result of the carrier's conduct. However, because the goods, as originally shipped, were already defective, the consignor was entitled to receive the price of the goods under its contract with the consignee less the amount it would have cost to remedy the original defects and to perform the contract properly.⁴⁴ This difference is what the consignor would ultimately have received as profit and was the proper measure of damages.

6. *Accord and Satisfaction.*—An injured motorcyclist in *Tabani v. Hester*,⁴⁵ refused to accept a draft marked "All Claims" from the tortfeasor's insurance company even though it was accompanied by a letter which stated that the draft was without obligation. The insurance company then tendered a draft without the offending

⁴²*Id.* at 46.

⁴³363 N.E.2d 1078 (Ind. Ct. App. 1977).

⁴⁴*Id.* at 1080.

⁴⁵366 N.E.2d 193 (Ind. Ct. App. 1977).

language together with a letter which stated that the amount was the largest the company would pay and that it was "a fair and equitable conclusion" of the claim.⁴⁶ The cyclist cashed the check and brought suit for the balance of his claim. The trial court held that this conduct constituted an accord and satisfaction and granted the tortfeasor's motion for summary judgment. The court of appeals reversed.⁴⁷

Accord and satisfaction is ordinarily a question of fact and becomes a question of law, determinable upon motion for summary judgment, only if the controlling facts are undisputed. "When the debt is unliquidated, the money paid to operate as a full discharge must be offered with either an express condition that acceptance is in full satisfaction of the pending claim or the circumstances must clearly indicate to the creditor that this condition is present."⁴⁸ Moreover, without the condition appearing on the draft, accord and satisfaction may be implied only on a showing of the subjective intent of the parties.⁴⁹ The cyclist's affidavit stated that he understood he would be able to seek additional recovery. This clearly raised an issue of fact which could not be disposed of by motion for summary judgment.

C. Consumer Law; Truth in Lending

The issue confronting the court in *Mirabal v. General Motors Acceptance Corp.*⁵⁰ was the proper amount of attorneys' fees to be allowed, after an earlier court of appeals decision in the same case⁵¹ which involved interpretation and application of the Federal Consumer Credit Protection Act (CCPA)⁵² and of Regulation Z of the Federal Reserve Board.⁵³ The earlier decision was the subject of discussion in the 1977 Survey.⁵⁴

The retail installment sales contract signed by the Mirabals included an inaccurate disclosure of the annual percentage rate, because the figure, apparently, had been taken from the wrong line of the table or chart by the employee who completed the disclosure form. About a week later, GMAC sent a letter explaining the error and setting forth the correct rate, although the amount of the

⁴⁶*Id.* at 194.

⁴⁷*Id.* at 195.

⁴⁸*Id.* at 194 (emphasis added) (citations omitted).

⁴⁹*Id.* at 195.

⁵⁰576 F.2d 729 (7th Cir. 1978) (per curiam).

⁵¹537 F.2d 871 (7th Cir. 1976).

⁵²15 U.S.C. §§ 1601-1691f (1976).

⁵³12 C.F.R. § 226.2(f) (1977).

⁵⁴Bepko, *Contracts, Commercial Law, and Consumer Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 100, 119-22 (1977).

payments remained unchanged.⁵⁵ The Mirabals filed suit for violation of the CCPA and recovered a judgment of approximately \$8,000 based on seven specific violations of the Act. The Court of Appeals for the Seventh Circuit sustained the findings of violation but reduced the judgment to \$2,000 because, according to the court, the CCPA permitted a maximum recovery of \$1,000 per litigant regardless of the number of disclosure violations in a single disclosure statement. The court remanded the case for entry of judgment in the amount of \$2,000 plus costs and attorneys' fees which were allowable by statute.

On remand, the Mirabals' attorney alleged that he had expended 350 hours on the case: 120 at trial and 230 on the first appeal, and that GMAC's attorneys had been paid \$30,000 for handling the case. These facts were not disputed. The district court allowed attorneys' fees of \$2,000, from which the Mirabals appealed. The court of appeals affirmed.⁵⁶

The analysis of the court of appeals deserves particular attention.

Although the determination of hours necessary to effectively handle a case is not subject to exact determination, the amount which petitioner claims to have spent on the present case seems clearly out of proportion with the *amount in controversy*. Moreover, Congress has limited the liability of Truth in Lending Act violators to \$1,000 per violation. 15 U.S.C. § 1640(a). To grant attorney's fees greatly in excess of a client's recovery requires strong support from the circumstances of the particular case. The instant case involved a one-time individual claim based mainly on a *bona fide arithmetical error*. . . .

Additionally, to grant large attorney's fee awards on the basis of relatively small injury would encourage suits which do not further the client's interest or the public's interest.⁵⁷

The court appears to have said that it will not sanction mammoth fees in suits based on inadvertent, one-time, technical violations accompanied by little or no harm to the borrower or to the public. The court's reference to the "amount in controversy," however, causes some concern. Consumer transactions involving more than one disclosure statement are the exception rather than the rule. With the \$1,000 per disclosure statement per plaintiff limitation in effect, to have the amount in controversy serve as any

⁵⁵The Mirabals denied receiving the letter. 576 F.2d at 730.

⁵⁶*Id.* at 731.

⁵⁷*Id.* at 730-31 (emphasis added).

basis for determining attorneys' fees would certainly have a chilling effect on private actions to redress violations of the CCPA. This is particularly true if the lender is resisting strenuously, as the dissent thought GMAC to be doing,⁵⁸ and the consumer's counsel can envision long hours and work fighting a corporate giant. Instead, the emphasis should be placed on the other elements noted by the court—the circumstances of the case and the nature of the violation and injury to consumer and public, without relation to the amount in controversy.⁵⁹

The court also rejected the contention that the amount of attorneys' fees paid by GMAC was indicative of what the borrowers' attorney should be paid and stated again the rule that it is an abuse of discretion to determine attorneys' fees solely on the basis of hours spent times billing rate.⁶⁰

During this survey period, a case involving truth in lending litigation under the CCPA reached the Indiana Supreme Court. In *Holmes v. Rushville Production Credit Association*,⁶¹ the court denied transfer, leaving the decision of the court of appeals⁶² in full force and effect. The dissent from the denial of transfer,⁶³ however, raises some important questions pertaining to the facts of the case.

The credit association had brought an action to recover the balances due on two notes. The borrowers raised various defenses, including violations of the disclosure requirements of the CCPA and Indiana's Uniform Consumer Credit Code.⁶⁴ The court of appeals initially affirmed the trial court's decision in favor of the lender.⁶⁵ On rehearing, the court of appeals vacated its earlier opinion and

⁵⁸See *id.* at 733-34.

⁵⁹The dissenting opinion expressed the belief that strong support from the circumstances of the case to support an award of higher fees did exist, particularly since the trial court had found numerous violations of the CCPA, and the borrowers were brought into the appellate court by GMAC's appeal. *Id.* at 733-34 (Swygert, J., dissenting). However, it was the trial court which had declared that expenditure of 350 hours on this case was "utterly unnecessary" and awarded \$2,000 based on its evaluation of the case and of the work of the borrowers' attorney. The dissenting opinion faulted the trial judge for not detailing specifically the reason counsel's expenditure of so much time was utterly unnecessary. *Id.* at 732-33 (Swygert, J., dissenting).

⁶⁰*Id.* at 731.

⁶¹371 N.E.2d 379 (Ind. 1978) (per curiam).

⁶²*Holmes v. Rushville Prod. Credit Ass'n*, 353 N.E.2d 509 (Ind. Ct. App.), *opinion temporarily withdrawn and case remanded*, 355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

⁶³371 N.E.2d at 379-81 (Hunter, J., dissenting).

⁶⁴IND. CODE §§ 24-4.5-1-101 to 6-203 (1976 & Supp. 1978).

⁶⁵353 N.E.2d 509 (Ind. Ct. App.), *opinion temporarily withdrawn and case remanded*, 355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

remanded the case for consideration of the disclosure violation defenses with which the trial court initially had failed to deal.⁶⁶ After reconsideration at the trial level, and a second appeal by the borrowers, the court of appeals affirmed the trial court's findings as to the alleged disclosure violations and reinstated its prior opinion, as modified.⁶⁷ It was the borrowers' petition to transfer this last decision which was denied by the supreme court.⁶⁸

From the facts as they appear in Justice Hunter's dissenting opinion, there were several violations of the CCPA, yet the court of appeals affirmed on the basis of the trial court's finding of *substantial compliance*. Moreover, the court of appeals upheld the findings of proper disclosure by "[a]ccording due regard to the trial court's opportunity to assess the witnesses' credibility . . .".⁶⁹ This result seems directly at odds with the CCPA's requirement of strict compliance with its terms.⁷⁰ The dissenting justice expressly recognized the issue, would have reversed the court of appeals, and would have awarded damages under the CCPA.⁷¹ It would be useless to speculate why the court denied transfer. If the court felt that the result would have been the same, perhaps it should have granted transfer and affirmed in a brief opinion which would reinforce, rather than cast some doubt on, the required strict compliance with the CCPA as applied in Indiana.

⁶⁶355 N.E.2d 417 (Ind. Ct. App.), *supplemental opinion*, 357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

⁶⁷357 N.E.2d 734 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978) (per curiam).

⁶⁸371 N.E.2d 379 (Ind. 1978) (per curiam).

⁶⁹*Id.* at 381 (Hunter, J., dissenting) (quoting 357 N.E.2d at 734).

⁷⁰Three defenses are available to lenders for failure to make proper disclosures:

(1) Correction of error and appropriate adjustments (15 U.S.C. § 1640(b)), (2) proof that "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error" (15 U.S.C. § 1640(c)), and (3) demonstration of action in conformity with then existing rules, regulations, and interpretations of the Federal Reserve Board (15 U.S.C. § 1640(f)). See D. ROTHSCHILD & D. CARROLL, CONSUMER PROTECTION § 12.01, at 331-32 (2d ed. 1977). None of these defenses applied in *Holmes*. (1) and (3) clearly did not, and (2) "was provided to avoid imposing 'strict liability' for unavoidable clerical errors upon creditors." *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d at 879 (citing *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1167 (7th Cir. 1974)).

⁷¹371 N.E.2d at 381 (Hunter, J., dissenting).

VI. Corporations

During the survey period several cases were decided which will have significant ramifications and, therefore, require analysis.¹

A. Squeeze-Out Mergers

The first of these cases, *Gabhart v. Gabhart*,² is an example of the developing trend under state law³ to protect minority shareholders through judicial review of corporate mergers paralleling the limiting of protection afforded by federal law.⁴ The plaintiff

¹There were two other decisions which require a limited discussion. In *Cummings v. Hoosier Marine Properties, Inc.*, 363 N.E.2d 1266 (Ind. Ct. App. 1977), the plaintiff attempted to utilize the doctrine of respondeat superior to impose liability on the defendant. The plaintiff asserted that the right of one defendant to supervise continuously the quality of the work was sufficient to negate the other defendant's independent contractor status. The court noted that the status between the parties was to be determined from the contract as a whole, and the independent exercise of control over the manner in which the work was to be performed was indicative of an independent contractor relationship.

In *Thompson Farms, Inc. v. Corno Feed Prods., Div. of Nat'l Oats Co.*, 366 N.E.2d 3 (Ind. Ct. App. 1977), the court held that a principal was bound by the acts of its agent within the scope of the agency relationship. The case is interesting because it indicates two bases for establishing that agency relationship. First, under the doctrine of apparent authority, the third party must reasonably rely on a representation by the principal that the agent has authority. The court found that the principal's name was prominently displayed throughout a sales brochure, the project was personally promoted by the principal, and the principal was directly involved in the sales transaction. Thus, the plaintiff reasonably could have assumed that the defendant was the principal in the transaction. *Id.* at 12. Second, the court indicated it was possible to conclude that the defendant had contracted for a special agent and that the agent was authorized to act in pursuance of the principal's project, further signifying that the agent's acts were within the scope of his actual authority. The court rejected the defendant's contention that it could not be both the seller and the financing agency in the transaction. This distinction is recognized in some jurisdictions. See *In re Sherwood Diversified Servs., Inc.*, 382 F. Supp. 1359 (S.D.N.Y. 1974); *Atlas Indus., Inc. v. National Cash Register Co.*, 216 Kan. 213, 531 P.2d 41 (1975). For another discussion of *Thompson Farms*, see Greenberg, *Contracts, Commercial Law, and Consumer Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 81, 83-86 (1978).

²370 N.E.2d 345 (Ind. 1977).

³See, e.g., *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974) (originally alleging federal securities law violations but decided under Georgia law); *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977); *Donahue v. Rodd Electrotype Co.* 367 Mass. 578, 328 N.E.2d 505 (Mass. 1975).

⁴The extent to which the Securities Exchange Act of 1934, 15 U.S.C. § 78a-jj (1976), and, more specifically, Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1977), will protect minority shareholders in a merger has been severely limited by the recent Supreme Court decision in *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977). In *Green* the defendants attempted to institute a short-form

in *Gabhart* raised two novel issues under Indiana law by alleging that a squeeze-out merger in Indiana must have a legitimate business purpose to be valid and that a former shareholder can have standing to sue in a derivative action. The Seventh Circuit Court of Appeals, after noting these issues required interpretation of Indiana statutes and corporation policy, certified the questions to the Indiana Supreme Court under Appellate Rule 15(O).⁵ By the *Gabhart* decision, Indiana joins the growing number of states which judicially examine statutorily conforming mergers that advance no valid business purpose and which may be unfair to minority shareholders.

In *Gabhart*, the plaintiff and the four individual defendants incorporated Washington Nursing Center, Inc., a nursing home in Washington, Indiana. Although all of the corporation's shareholders

merger between a wholly-owned subsidiary of Sante Fe and Kirby Lumber Company, a Delaware corporation. The plaintiffs held approximately 5% of the outstanding stock of Kirby and the Santa Fe subsidiary owned the remaining 95%. The defendant attempted to merge the two corporations pursuant to § 253 of the Delaware Corporation Law which permitted a parent corporation owning at least 90% of the corporate stock of the subsidiary to merge the parent and the subsidiary with approval of only the parent's board of directors and shareholders. The minority shareholders in the subsidiary would, thus, be relegated to an appraisal remedy for their surrendered stock. The plaintiffs petitioned the state court for an appraisal of the Kirby stock but withdrew the petition and filed the federal action. The plaintiffs attempted to rescind the merger, alleging that it was effected for no valid business purpose and that the appraisal of the stock was fraudulent. They contended that the defendant's attempt to institute the appraisal remedy at the perceived fraudulently deflated price constituted a "device, scheme or artifice to defraud" and engaged in an 'act, practice' or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'" *Id.* at 467-68 (quoting 17 C.F.R. § 240.10b-5(a), (c) (1977)). The Supreme Court held that an alleged breach of fiduciary duty would support a rule 10b-5 claim only if the conduct was manipulative or deceptive within the meaning of the statute. The court noted the available state remedy provided evidence that Congress did not intend to create an implied federal cause of action if the conduct was not manipulative or deceptive. *Id.* at 478-80. The court further concluded that there had been no omission or misstatement in the documents accompanying the merger and that this full disclosure was in accord with the fundamental purpose of the Securities Exchange Act of 1934. Thus, a remedy for such conduct should not be implied where "unnecessary to ensure the fulfillment of Congress' purposes." *Id.* at 477. Most squeeze-out mergers are implemented in compliance with local corporate statutes, and the *Green* decision will mean that challenges to these mergers will not be permitted under rule 10b-5 unless the mergers are also manipulative or deceptive. The *Green* decision indicates that § 10b will not empower the federal courts to create an independent common law of fiduciary obligations. There has, however, been some support for the displacing of local law and for instead establishing a federal minimum standards act which would cover corporate fiduciary obligation. See *The Role of the Shareholder in the Corporate World: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

⁵IND. R. APP. P. 15(O).

were originally directors, the plaintiff was not able to devote sufficient time to the enterprise and resigned as a director approximately two years after incorporation.⁶ The remaining directors wanted to purchase plaintiff's shares to gain total control of the corporation, but extensive discussions concerning the stock purchase proved unsuccessful. Thereupon, the majority shareholders who remained as directors attempted to acquire plaintiff's shares through a corporate restructuring merger. They formed a new corporation, the surviving company, in which they were the sole shareholders, and, as directors of both the surviving company and the merging company executed a long-form merger agreement.⁷

The specific provisions of the merger agreement provided:

- (1) The Merging Company will merge into and become a part of the Surviving Company, leaving the Surviving Company with all the property of both companies and all the rights and liabilities of both companies.
- (2) "Any claim existing or action or proceeding pending by or against the Merging Company or the Surviving Company may be prosecuted to judgment as if the merger had not taken place or the Surviving Company may be substituted in the place of the Merging Company."
- (3) Each shareholder of the Merging Company shall surrender his shares and receive in exchange therefor a debenture equal in amount to the number of his shares times \$300, the debenture to bear interest at 7½% and to mature in 5 years.
- (4) Each stockholder of the Merging Company shall cease to be such and "shall have no interest in or claim against the

⁶370 N.E.2d at 348.

⁷There are two distinct types of merger which can be used in an attempt to freeze out minority shareholders. The long-form merger is more extensive and requires the approval of boards of directors of both corporations and approval of the merger by a majority of shareholders of the involved corporations. A long-form merger also requires that notice of the proceedings be given to all shareholders. See IND. CODE § 23-1-5-2 (1976).

A short-form merger permits a parent corporation which owns a minimum percentage of the corporate stock of a subsidiary (state laws vary on the amount of stock required) to implement a short-form merger. Many states require a minimum percentage of 90%; others, including Indiana, require 95% ownership to merge the subsidiary with the parent corporation with the approval of the parent's board of directors and usually a majority of its shareholders. The short-form merger generally does not require a shareholder vote by minority shareholders of the subsidiary or any prior notice to these minority stockholders. Indiana does not require a vote by the majority shareholders of the parent corporation, but does require notice to be sent to the shareholders of the subsidiary. *Id.* § 23-1-5-8.

Surviving Company by reason of having been such a shareholder, except the right to receive the above described debenture.”⁸

A special meeting of the merging company's shareholders was held on July 3, 1972, to vote on acceptance of the merger proposal. Ten days prior to that meeting, a notice of the meeting and a copy of the proposed merger agreement was sent, by registered mail, to the three addresses listed for the plaintiff on the corporate records. The plaintiff, however, did not actually receive the notice until one week after the meeting had taken place.⁹ In the plaintiff's absence, the remaining shareholders approved the merger, and prior to the effective date of the merger, the defendants exchanged their stock in the merging company, leaving the surviving company as the majority shareholder in the merging company except for the minority interest owned by the plaintiff. Pursuant to the merger agreement, the plaintiff received the debenture for his shares in the merging company. This procedure eliminated the plaintiff from any further equity interest in either the merging company or the surviving company. The merging company was then dissolved.¹⁰

The plaintiff did not elect to utilize the object and demand procedure of the Indiana General Corporations Act which would have provided him an appraisal remedy.¹¹ Instead, before the date the merger was to become effective, he filed a diversity action against the merging company and individual defendants, alleging pecuniary injury to the corporation and charging the individual defendants with misappropriation of corporate funds. Further, the defendants were charged with denying plaintiff the opportunity to participate in corporate decisions and examine corporate records.¹² Because shareholder status is normally a prerequisite to bringing a derivative suit on behalf of a corporation,¹³ the defendants moved for summary judgment asserting that the plaintiff had no standing to maintain the derivative claim. The plaintiff responded by amending his complaint to additionally charge that the merger could be attacked under Indiana law because the “sole purpose of the merger had been to deprive him of his interest in the business operated by the Merging Company.”¹⁴

⁸370 N.E.2d at 349.

⁹*Id.* This notice is required under IND. CODE § 23-2-5-2(a)(5) (1976). The form for such notice is set forth in *id.* § 23-1-2-9(d).

¹⁰370 N.E.2d at 349.

¹¹IND. CODE § 23-1-5-7 (1976).

¹²See Great Fidelity Life Ins. Co. v. Circuit Court, 259 Ind. 441, 288 N.E.2d 143 (1972).

¹³370 N.E.2d at 356.

¹⁴*Id.* at 349.

1. *Appraisal and the Valid Business Purpose Requirement for a Merger.*—The *Gabhart* merger was consummated in procedural compliance with the merger provisions of the Indiana General Corporations Act. Despite this compliance, the plaintiff attacked the merger as having no legitimate business purpose and as being designed only to squeeze him out of the corporation.

The term "squeeze-out" is used to denote those situations in which the owners or majority of shareholders use "inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants."¹⁵ The term has come to imply a purpose to force a liquidation or sale of the shareholders' shares, not incident to a legitimate business purpose¹⁶ and normally does not contemplate an adequate compensation to the minority shareholders.¹⁷

Under the Indiana General Corporations Act, the dissenting shareholder in a merger may compel the surviving corporation, via the remedy known as appraisal, to purchase his shares.¹⁸ Under the controlling statute, a shareholder who votes against the proposed merger or who does not vote may elect to use appraisal and object to the proposed merger in writing within thirty days and demand payment for his shares.¹⁹ If the corporation and the dissenting shareholder are unable to agree on a value for the stock, then the court will compute the stock's appraised value pursuant to the procedure found within the eminent domain statute.²⁰ This procedure is contrary to many states' practices which specify a separate pro-

¹⁵F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS § 101, at 1 (1975). See also Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964). See generally Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019 (1975); Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974); Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CAL. L. REV. 1 (1969); Manning, *The Shareholders Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223 (1962). The squeeze-out is often called a cash-out, freeze-out or take-out merger.

¹⁶Vorenberg, *supra* note 15, at 1192-93.

¹⁷F. O'NEAL, *supra* note 15, § 1.01, at 1. Although a squeeze-out can be accomplished through several techniques, they most commonly take the form of a merger of a corporation into an existing parent or into a shell corporation formed for this purpose. See Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978).

¹⁸IND. CODE § 23-1-5-7 (1976). The appraisal remedy has traditional roots in Indiana law and is used in mergers and consolidations. See *State v. Bailey*, 16 Ind. 46 (1861). It is also available to shareholders who dissent from "special corporate transactions" which involve the sale of all or almost all of the assets of a corporation. See IND. CODE §§ 23-1-6-1, -5 (1976).

¹⁹IND. CODE § 23-1-5-7 (1976).

²⁰370 N.E.2d at 352. The procedure covering eminent domain in Indiana is codified at IND. CODE § 32-11-1-6 (1976).

cedure for the computation of the stock's appraised value based on its "fair value."²¹

Often, the majority shareholder delays payment for the tendered shares and the minority shareholders are forced to seek an injunction to halt the merger until they are compensated.²² But the use of the injunction is discouraged and present Indiana statutes provide an exclusive procedure by which the surviving corporation of a merger is compelled to purchase the shares of the dissenting shareholders.²³ The majority of states, by statute or case law, recognize the right of appraisal as the sole relief available to a dissenting shareholder in a merger.²⁴ However, some recent cases question the appraisal remedy's ability to adequately compensate the minority shareholders in a squeeze-out merger.²⁵ In *Gabhart*, the Indiana Supreme Court recognized the possible adequacy of the appraisal remedy in the sense that a minority shareholder could receive the investment value of his interest.²⁶ The inability of appraisal rights to adequately compensate minority shareholders may be an additional justification for limiting the application of the remedy in a squeeze-out merger.²⁷

Prior to *Gabhart*, Indiana courts adhered to the traditional rule and refused to enjoin a merger unless there was evidence of fraud or a breach of fiduciary duty. In *Raff v. Darrow*,²⁸ the Indiana Supreme Court stated:

²¹See, e.g., ARIZ. REV. STAT. ANN. § 10-081(k) (1977); CAL. CORP. CODE § 1300(a) (West 1977); CONN. GEN. STAT. ANN. § 33-374(d) (West 1960); DEL. CODE ANN. tit. 8, § 262(f) (1977); GA. CODE ANN. § 22-1202(g)(4) (1977); MD. CORP. & ASS'NS CODE ANN. § 3-210 (1975); NEB. REV. STAT. § 21-2080 (1977); OHIO REV. CODE ANN. § 1701.85(c) (Page 1977); PA. STAT. ANN. tit. 15, § 805 (Purdon 1967); TENN. CODE ANN. § 48-909(5) (1964); TEXAS BUS. CORP. ACT art. 15.16(E)(1) (Vernon 1977); WIS. STAT. ANN. § 180.72(2) (West 1977); MODEL BUS. CORP. ACT § 81 (1971).

The appraisal remedy is not available to the shareholders of any corporation which is the surviving corporation in a merger with respect to which no vote of the shareholders was required under the General Corporations Act, IND. CODE § 23-1-5-7 (1976), nor to the holders of shares registered on a national securities exchange on the date fixed to determine shareholders entitled to receive notice of and to vote on mergers, consolidations, or special corporate transactions unless the articles of incorporation otherwise provide. *Id.* §§ 23-1-5-7, -6-5.

²²370 N.E.2d at 352.

²³*Id.*

²⁴H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 349 (2d ed. 1970). The Model Business Corporation Act provides for an appraisal remedy in mergers, consolidations, and actions where the majority of a corporation's assets are transferred outside the regular course of business. See MODEL BUS. CORP. ACT ANN. §§ 73-74 (2d ed. 1971).

²⁵See authorities cited in note 3 *supra*.

²⁶370 N.E.2d at 354.

²⁷See Brudney, *supra* note 15, at 1024; Vorenberg, *supra* note 15, at 1201-03.

²⁸184 Ind. 353, 111 N.E. 189 (1916).

It is the policy of the law to leave corporate affairs to the control of corporate agencies and the courts are not warranted at the suit of minority shareholders in interfering with the management of such agencies even though it may be unwise and may result in loss, except in a plain case of fraud, breach of trust, or such maladministration as works a manifest wrong to them.²⁹

Some recent cases have invaded the corporate boardroom and have indicated a willingness to emphasize the fiduciary duty owed by the controlling shareholders, directors, and officers to the minority and, thus, have restricted the application of a squeeze-out merger.³⁰ This fiduciary duty concept implies that the majority may not exercise corporate powers if the operation simply enriches the majority at the minority's expense.³¹

There are few cases which have considered the legitimate business purpose requirement in a merger. A brief examination of some of these major cases will serve to illustrate some of the problems inherent in this analysis and provides some interesting comparisons with the approach followed by the Indiana Supreme Court in *Gabhart*.

In *Bryan v. Brock & Blevins Co.*,³² the majority shareholders attempted to utilize a squeeze-out merger to gain total control of the corporation. Although the merger was in procedural compliance with Georgia law,³³ the court concluded that a merger could be challenged unless it was justified by a valid business purpose inherent in the merger itself.³⁴ The Delaware Supreme Court has recently ventured into the uncharted waters surrounding the legitimate business purpose, or lack thereof, of an otherwise statutorily valid merger. In *Singer v. Magnavox Co.*,³⁵ the court held

²⁹*Id.* at 360, 111 N.E. at 191.

³⁰See cases cited in note 3 *supra* and accompanying text.

³¹The United States Supreme Court set out the standard of conduct for a fiduciary in *Pepper v. Litton*, 308 U.S. 295, 311 (1939):

[The majority shareholder] cannot violate rules of fair play by doing indirectly . . . what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the *cestuis*.

³²490 F.2d 563 (5th Cir. 1974).

³³GA. CODE ANN. § 22-1001 (1970).

³⁴490 F.2d at 570.

³⁵380 A.2d 969 (Del. 1977).

that a long-form merger by controlling shareholders, effected only to squeeze out minority shareholders, was a violation of the fiduciary duty that the majority shareholders owed to the minority.³⁶ Under the *Singer* approach, a court examining a challenged merger would analyze the entire merger process to see if the fiduciary obligation of the majority fulfilled the "entire fairness" test of *Sterling v. Mayflower Hotel Corp.*³⁷ The *Singer* court further held that "entire fairness" includes more than merely a valid business purpose and, even if the court were to find a legitimate business purpose, "the fiduciary obligation of the majority to the minority shareholders remains and proof of a purpose, other than such freeze-out, without more, will not necessarily discharge it."³⁸

The Indiana Supreme Court in *Gabhart* was unwilling to intrude into corporate management to the same extent as the *Singer* court.³⁹ The court, confining the corporation to the statutory procedures outlined under the Indiana General Corporations Act, analyzed a merger without a legitimate business purpose as a "defacto corporate dissolution" and concluded that the squeeze-out merger operated as a dissolution favoring the selected majority shareholders.⁴⁰ Because a dissolution is designed to sever relationships among corporate shareholders, the court reasoned there was no justification for allowing the majority shareholders to apply the more restricted merger provisions to accomplish the same result.⁴¹

Consequently, under *Gabhart*, minority shareholders may challenge any offending merger as a "defacto dissolution." As the court noted: "In a dissolution, a shareholder is not limited to appraisal proceedings if he questions the fairness of the process. Rather, the liquidation and distribution of the corporate assets are subject to all principles of equity."⁴² This unique analysis seems to indicate that the minority shareholders will receive fair treatment but, at the same time, it does not force the majority shareholders to offer the minority an equity interest in the new corporation. This result has been suggested in some cases.⁴³ In reality, though, the impact may be the same because the dissolution of a profitable corporation may be too high a price to pay for gaining complete shareholder control.

³⁶*Id.*

³⁷33 Del. Ch. 293, 93 A.2d 107 (1952).

³⁸380 A.2d at 980.

³⁹370 N.E.2d at 356.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

⁴³See *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

The Indiana Supreme Court contemplated that their "defacto dissolution" remedy would not intrude into corporate management to the extent of having every proposed merger subject to judicial review. Still, the practical effect will probably not result in a reduction of judicial review because the court is required to assess the legitimate business purpose of any merger that is attacked, and, if such purpose is lacking, it is immaterial if the remedy is an injunction to the merger or a forced recourse to the statutorily provided method of dissolution.

The *Gabhart* court concluded that, to attack a proposed merger under the defacto dissolution approach, the merger must be without any valid business purpose and must operate to reduce or eliminate the equity position of minority shareholders.⁴⁴ This dual requirement is necessary because it is not the fact that the merger is without a valid business purpose which disadvantages the minority shareholders. Rather, the elimination of the minority's equity position works the ultimate hardship.

One potential problem *Gabhart* left unresolved is whether the valid purpose test⁴⁵ should focus on the merging company or the surviving company. This problem was recognized in *Singer* where the court described the scope of the business purpose inquiry: "Is that [the business purpose] of the corporations whose shares are (or were) held by the minority? . . . And if the business purpose of the parent (or dormant) corporation should be examined . . . minority shareholders of the subsidiary (or controlled corporation) may have difficulty in raising or maintaining the issue."⁴⁶ The post-*Singer* Delaware case of *Tanzer v. International General Industries, Inc.*,⁴⁷ concluded that a legitimate purpose of a parent or surviving corporation is sufficient to validate the merger. If the scope of the business purpose test focuses only on the surviving corporation, the minority shareholders may have difficulty in asserting a lack of a legitimate business purpose.⁴⁸ Probably the most reasonable ap-

⁴⁴370 N.E.2d at 356.

⁴⁵See Scott, *Going Private: An Examination of Going Private Transactions Using the Business Purpose Standard*, 32 Sw. L.J. 641 (1978) for a discussion of those activities which have traditionally been considered legitimate business purposes.

⁴⁶380 A.2d at 976.

⁴⁷379 A.2d 1121 (Del. 1977).

⁴⁸The courts are often liberal in deciding what will constitute a legitimate business purpose. The court, in *Grimes v. Donaldson, Lufkin & Jenrette, Inc.*, 392 F. Supp. 1393 (N.D. Fla. 1974), *aff'd mem.*, 521 F.2d 812 (5th Cir. 1975), concluded that operational efficiencies and the elimination of potential conflicts of interest are valid business purposes. If the scope of the valid business purpose test focuses on only the surviving corporation, then it will be fairly simple to show some benefit which will only accrue to the survivor.

proach is to examine the entire transaction for a legitimate business purpose.⁴⁹ The procedure will force the majority shareholders to prove the merger's necessity in advancing a legitimate business purpose before the minority shareholders have only an appraisal remedy at their disposal.

The *Gabhart* decision does not indicate if the legitimate business purpose test is also to be applied to mergers attempted pursuant to Indiana's short-form merger statute. One Delaware case⁵⁰ suggested that the purpose of the short-form merger statute is actually to eliminate minority interests, and probably the legitimate business purpose test should not be extended to cover short-form mergers.

The *Gabhart* court missed an opportunity to add some much-needed guidance to the rapidly expanding body of case law on corporate freeze-outs or squeeze-outs by failing to differentiate among the variations of such transactions. As noted by other commentators, freeze-outs seem to fall into three distinct catagories: (1) Two-step mergers (the tender offer and the merger), (2) pure going-private transactions, and (3) mergers of long-held affiliates.⁵¹ Each of these distinct categories represent different policy considerations and, hence, require different levels of examination and different levels of minority shareholder protection. A generalized business purpose test applied to all such transactions might prove undesirable when universally applied to all fact situations.

Nonetheless, the Indiana decision in *Gabhart* is representative of the trend toward requiring a legitimate business purpose for mergers. It is important that these state remedies continue to be established now that the United States Supreme Court has refused to imply a federal cause of action for non-manipulative breaches of fiduciary obligation under rule 10b-5.

2. *Standing in Derivative Actions.*—In addressing the derivative claim for corporate mismanagement by the *Gabhart* plaintiff, the Indiana Supreme Court held that equitable factors may

⁴⁹See, e.g., *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), cert. denied, 419 U.S. 844 (1974). The Indiana Supreme Court also failed to specify exactly which party will be required to carry the burden of proof in demonstrating that a legitimate business purpose exists. The New York Supreme Court in *Tanzer Economic Assocs. Profit Sharing Plan v. Universal Food Specialties, Inc.*, 87 Misc. 2d 167, 383 N.Y.S.2d 472 (N.Y. Sup. Ct. 1976) placed the burden on the plaintiff. The *Gabhart* decision seems to indicate that, once the plaintiff has charged that the merger has no legitimate purpose, the surviving corporation will be required to demonstrate that the merger contains a valid business purpose.

⁵⁰*Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (1962).

⁵¹See *Brudney & Chirelstein, A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354 (1978); *Green, Corporate Freeze-out Mergers: A Proposed Analysis*, 28 STAN. L. REV. 487, 490-96 (1976).

allow a former shareholder to maintain a derivative suit.⁵² Generally, a plaintiff in a derivative suit must be a present shareholder of the corporation whose cause of action is being pursued.⁵³ This requirement ensures that the shareholder-plaintiff will have at least an indirect property interest in the outcome of the derivative action because the recovery that will accrue to the corporation will enhance the value to all shareholders.⁵⁴

In *Gabhart* the derivative cause of action which arose on behalf of the merging company was transferred to the surviving corporation along with all the corporation's other assets and liabilities.⁵⁵ Consequently, if the merging company itself is barred from asserting a claim because its cause of action is transferred to the surviving company, then the shareholders of the merging company have no derivative rights. However, if the shareholders of the merging company are made shareholders of the surviving company, there is no bar to their individual assertion of a derivative claim. The surviving company itself will usually be able to maintain such a claim, and, if the directors of the surviving company do not pursue the cause of action in the name of the surviving company, then the shareholders can invoke their own derivative claim.⁵⁶ Thus, standing is usually available in some capacity and majority shareholders or directors probably will not be able to insulate themselves from liability for personal misconduct through a merger.

However, if none of the shareholders of the surviving corporation are entitled to assert a derivative claim, equitable constraints may also prevent the successor corporation from enforcing the claim. This equitable constraint was first enumerated in the oft-cited case of *Home Fire Insurance v. Barber*⁵⁷ which was followed by the United States Supreme Court in *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad*.⁵⁸ In *Bangor Punta* the Court held that a corporation which purchased all of the assets of another corporation, for a fair consideration, may not recover against the vendor corporation for alleged acts of corporate mismanagement if the shareholders of the purchasing corporation were not injured by the alleged wrongful activities.⁵⁹

⁵²370 N.E.2d at 357.

⁵³See IND. R. TR. P. 23.1.

⁵⁴See *Meyer v. Fleming*, 327 U.S. 161, 167 (1946).

⁵⁵See IND. CODE § 23-1-5-5 (1976). See also *Heit v. Tenneco, Inc.*, 319 F. Supp. 884 (D. Del. 1970).

⁵⁶*Meyer v. Fleming*, 327 U.S. at 167. It is irrelevant that the minority shareholders own a minuscule percentage of the corporation's outstanding shares. *Ashwander v. TVA*, 297 U.S. 288, 318 (1936).

⁵⁷67 Neb. 644, 93 N.W. 1024 (1903).

⁵⁸417 U.S. 703 (1974).

⁵⁹There were 20 shareholders of the purchasing company who also were shareholders of the vendor corporation. The court was unwilling to let the existence of

In *Gabhart*, because all of the surviving corporation's shareholders had participated in the alleged wrongdoing, they would be unwilling to assert a claim against themselves, and, even if they did, equity would preclude the corporation from asserting any claim, and they could escape liability. However, just as courts of equity have prevented surviving corporations from succeeding to the merging company's cause of action where none of the shareholders have the requisite standing, the courts can also directly attack the merger, insuring that the wrongdoers will not escape liability and that innocent shareholders will be protected.⁶⁰

As the *Gabhart* court noted, any merger which is attempted only to cover up wrongdoing may be attacked as having no legitimate business purpose.⁶¹ The merger itself may have a valid motivation, but corporate misconduct can also accompany the merger and a legitimate business purpose alone should not control the liability of the wrongdoers. The *Gabhart* court concluded:

[A] Court of Equity may grant relief, pro-rata to a former shareholder, of a merged corporation whose equity was adversely affected by the fraudulent act of an officer or director and whose means of redress otherwise would be cut off by the merger, if there is no shareholder of the surviving corporation eligible to maintain a derivative action for such wrong and said shareholder had no prior opportunity for redress by derivative action against either the merged or the surviving corporation.⁶²

This reasoning indicates that the court will carefully apply equitable discretion only if the plaintiff has no other opportunity to assert the claim.

B. Successor Corporation's Liability for Product Liability Claims

In *Travis v. Harris Corp.*⁶³ the Seventh Circuit Court of Appeals curbed the trend of imposing liability on successor corporations for harm caused by a defective or dangerous product of the predecessor corporation.⁶⁴

20 minority shareholders entitle the corporation to recover damages, in the amount of \$7,000,000, where the corporation would be the principal beneficiary. *Id.* at 712 n.8. For a novel discussion of potential reasons for not extending equitable constraints on standing, where creditors may be benefited by the recovery and the public can be benefited through improved railroad transportation, see the dissenting opinion of Justice Marshall.

⁶⁰See *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

⁶¹370 N.E.2d at 357.

⁶²*Id.* at 358.

⁶³565 F.2d 433 (7th Cir. 1977).

⁶⁴See also *Knapp v. North Am. Rockwell Corp.*, 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975); *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974); *Ray v.*

In 1973, one of the plaintiffs in *Travis* caught his hand in a die press machine as he tried to extricate cardboard from the machine's pincher bar.⁶⁵ The die press machine was originally designed, manufactured, and sold by T.W. & C.B. Sheridan Company to Inland Container Corporation in 1957; Inland, in 1972, sold the machine to Ohio Valley Container Corporation, the plaintiff's employer. Eight years before Inland sold the die press machine to Ohio Valley, T.W. & C.B. Sheridan Company had sold most of its assets, for a cash consideration, to Harris-Intertype Corporation. Harris-Intertype formed a new subsidiary, T.W. & C.B. Sheridan Company, a new company using the name of the selling company, to receive the assets of the sale.

Subsequently, the subsidiary was merged into Harris-Intertype. In 1974 Harris-Intertype changed its name to Harris Corporation, but before that, in 1972, it had sold the assets used in manufacturing the die press and related spare parts, including the good will related thereto to the Bruno Sherman Corporation.⁶⁶ Plaintiffs filed suit against Harris and Bruno Corporations for negligence and strict liability for the design, manufacture, and distribution of the die press machine. The district court decision granted the defendants' motion for summary judgment and the plaintiffs appealed.⁶⁷

When a corporate acquisition or transfer is structured as a merger or consolidation, the acquiring or new corporation automatically becomes liable for claims against the merging or constituent corporations.⁶⁸ Traditionally, a corporation that merely purchases the assets of another corporation for cash will not be responsible for the liabilities of the predecessor.⁶⁹ The transfer of assets is essentially a transfer of property between different entities. There are, however, four well-established exceptions to this general rule. There will be liability if: (1) The purchasing corporation expressly or impliedly agrees to assume the sellers' liabilities,⁷⁰ (2) the transaction amounts to a defacto merger or consolidation of the purchaser and seller,⁷¹ (3) the purchasing corporation acts as a mere continuation of the seller,⁷² or (4) the transaction is fraudulently entered for

Alad Corp., 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976).

⁶⁵565 F.2d at 445.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸See IND. CODE § 23-1-5-5(e) (1976).

⁶⁹565 F.2d at 446.

⁷⁰See, e.g., *Bouton v. Litton Indus. Inc.*, 423 F.2d 643 (3d Cir. 1970); *Turnbull Inc. v. Commissioners*, 373 F.2d 91 (5th Cir.), cert. denied, 389 U.S. 842 (1967).

⁷¹See, e.g., *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797 (W.D. Mich. 1974).

⁷²See, e.g., *Cyr v. B. Offen & Co. Inc.*, 501 F.2d 1145 (1st Cir. 1974).

the purpose of escaping liability for the seller's debts.⁷³

Usually, a corporation that has sold most of its assets will usually dissolve pursuant to state statute. Even if the corporation remains intact, there might well be few assets to satisfy any potential claims. This leaves the product liability plaintiff with little alternative except to try to establish a basis of liability for the successor corporation through one of these exceptions.

The four exceptions in which the successor corporation in the sale of assets situation is held liable have traditional roots in protecting the appraisal remedy of dissenting shareholders, protecting established creditor claims, and for tax purposes.⁷⁴ Courts have extended the use of these exceptions to cover the transferee liability in products liability cases.⁷⁵

The express or implied assumption of liability is often of little use to the products liability plaintiff. When the assumption is even mentioned, it is usually to specifically limit the liability of the purchasing corporation.⁷⁶ In *Travis* the sales contract specifically excluded the assumption of any such liability.⁷⁷

Similarly the fourth exception, the avoidance of debts, has little application. A products liability claim is contingent and, thus, not an existing debt of the corporation when the transfer was made. Of course, a different situation exists where a corporation sells its assets after a products liability claim arises, but before any judgment is imposed.

Under the defacto merger exception, if the purchase of the assets amounts to a merger or consolidation, the purchaser assumes the liabilities of the seller.⁷⁸ Courts have consistently refused to find a defacto merger where the asset seller remains in existence, or where there was cash consideration for the sale of the assets which is available to satisfy any judgments.⁷⁹ The payment of cash consideration indicates a break in the corporate entities. Similarly, where the seller remains in existence, it indicates no intended assumption of the seller's liabilities by the purchaser which is characteristic of a merger.

⁷³See, e.g., *Pierce v. Riverside Mortgage Sec. Co.*, 25 Cal. App. 2d 248, 251, 77 P.2d 226, 229 (1938) (quoting *West Tex. Ref. & Dev. Co. v. Commissioner*, 68 F.2d 77, 81 (10th Cir. 1933)).

⁷⁴See Note, *Assumption of Products Liability in Corporate Acquisitions*, 55 B.U.L. REV. 86, 94-95 (1975).

⁷⁵See authorities cited in note 64 *supra*.

⁷⁶See, e.g., *McKee v. Harris-Seybold Co.*, 109 N.J. Super. 555, 264 A.2d 98 (1970), *aff'd per curiam*, 118 N.J. Super. 480, 288 A.2d 585 (1972), *overruled on other grounds*, *Wilson v. Fare Well Corp.*, 140 N.J. Super. 476, 356 A.2d 458 (1976).

⁷⁷565 F.2d at 445-46.

⁷⁸See *Forest Laboratories, Inc. v. Pillsbury Co.*, 452 F.2d 621, 625 (7th Cir. 1971).

⁷⁹*Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817, 821 (D. Colo. 1968).

Where two corporations are separate and distinct before and after the sale, there will be no defacto merger. In *Travis* the court treated the transfer of the assets for cash as conclusively indicative of no defacto merger.⁸⁰

The "mere continuation" exception will impose liability on the purchasing corporation where the new entity is only a re-creation of the original entity and not merely a corporation similar with regard to various common factors.⁸¹ The mere continuation exception also requires the continued control of individuals who managed the predecessor corporation.⁸² In *Kloberdanz v. Joy Manufacturing Co.*,⁸³ the court found no continuation where "there was no common identity of stock, directors, or officers or shareholders . . .".⁸⁴

The *Travis* court noted that, although former employees of Sheridan worked for Harris, there was not the continuity of stock, stockholders, or directors required under the traditional continuity exception.⁸⁵ The purchaser and seller existed as distinct corporate entities after the sale.

Recent court decisions on transfer liability have shown a tendency to relax the traditional corporate law exceptions and place more emphasis on the policy considerations underlying strict liability. Some courts, however, appear more willing to try to expand the somewhat inflexible exceptions to fit the particular fact situations than to abandon the traditional rules.

An illustration of this trend is the Indiana Court of Appeals decision in *Cyr v. B. Offen & Co.*,⁸⁶ in which the court imposed liability on a successor corporation using the mere continuation exception⁸⁷ although, as noted above, generally there is no liability if there is a separation of ownership between the purchaser and seller.⁸⁸ The *Cyr* court recognized the applicability of using tort policy considerations in evaluating the contingent tort liability of the purchaser.⁸⁹

⁸⁰565 F.2d at 447.

⁸¹National Dairy Prods. Corp. v. Borden Co., 363 F. Supp. 978, 980 (E.D. Wis. 1973).

⁸²Lopata v. Bemis Co., 383 F. Supp. 342, 345 (E.D. Pa. 1974), *vacated*, 517 F.2d 1398 (3d Cir. 1975).

⁸³288 F. Supp. 817 (D. Colo. 1968).

⁸⁴*Id.* at 821.

⁸⁵565 F.2d at 447.

⁸⁶501 F.2d 1145 (1st Cir. 1974).

⁸⁷*Id.* at 1154.

⁸⁸See, e.g., *Kloberdanz v. Joy Mfg. Co.*, 288 F. Supp. 817 (D. Colo. 1968) (requiring common identity of stock, directors, officers, and stockholders).

⁸⁹See, e.g., *Bazan v. Kux Mach. Co.*, 358 F. Supp. 1250 (E.D. Wis. 1973). The court noted that the successor was not the legal entity which launched the defective product into the stream of commerce. The court reasoned, however, that the purchaser profited from the goodwill the product and the corporation may have acquired. 501 F.2d at 1154.

However, the court's attempt to combine these policies into the traditional continuation corporate exception produced an unclear result. The *Cyr* decision indicates a willingness to relax, but not totally abandon, the traditional corporate law exceptions.

Other cases have rejected the attempt to fit the traditional corporate law exceptions into successor liability and focus on the policies underlying products liability. In *Turner v. Bituminous Casualty Co.*⁹⁰ the Michigan Supreme Court established a "products liability continuity principle" for gauging the degree of continuity resulting from the transfer regardless of the traditional boundaries of the corporate law exceptions.⁹¹

In *Ray v. Alad Corp.*⁹² the California Supreme Court held that a successor corporation that continued the predecessor's same product line was liable for products liability claims arising from defective products sold by the predecessor. The court did not attempt to expand traditional corporate law exceptions to support its conclusion, but grounded its holding on the basis of the policies underlying products liability.⁹³ The court stated three factors which would support the liability placed on the successor corporation. First, the dissolution of the predecessor corporation will usually leave the injured plaintiff without a remedy. Second, the successor corporation is in the best position to spread the costs of the injuries on the present customers. Finally, a continued product line insures that the successor corporation will enjoy the goodwill associated with the predecessor. The court concluded that, if the successor corporation enjoys this goodwill, it must also bear the burden of the predecessor's defective products.⁹⁴ The *Ray* decision focused on the continued product line and rejected traditional corporate defenses. Instead, it attempted to incorporate the social costs of defective products into the cost of production.

The plaintiffs in *Harris* attempted to assert the *Ray* product line test, but the court declined to adopt such a far-reaching rule and concluded that such a result is best left to the legislature.⁹⁵ The court could have certified the issue to the Indiana Supreme Court which, arguably, is in a better position to evaluate Indiana's commitment to products liability and decide if an Indiana remedy for successor corporate liability is appropriate.⁹⁶

⁹⁰397 Mich. 406, 244 N.W.2d 873 (1976).

⁹¹*Id.* at 416, 244 N.W.2d at 877-79.

⁹²560 P.2d 3, 136 Cal. Rptr. 574 (1977).

⁹³*Id.* at 7, 136 Cal. Rptr. at 578.

⁹⁴*Id.*

⁹⁵565 F.2d at 447-48.

⁹⁶The new issue could have been certified to the Indiana Supreme Court as was done in *Gabhart*. See IND. R. APP. P. 15(0).

Although a legislative scheme might be the best method to resolve the liability of the transferee corporation, no state has yet developed such legislation. Both the *Ray* and *Turner* decisions illustrate the need to dispense with traditional corporate analysis in assessing the transfer liability of a corporation in a products liability suit and to develop rules which will impose liability in accord with the policies associated with products liability. An expansion of the corporate law exceptions will only inhibit their usefulness and certainty for the original purposes for which they were intended.

C. Capacity To Be Sued: Unincorporated Associations

In *O'Bryant v. Veterans of Foreign Wars*, No. 1552,⁹⁷ the Indiana Court of Appeals held that a member of an unincorporated association can sue the association for negligence. The plaintiff brought suit against the VFW for bodily injuries allegedly suffered because of the VFW's negligence. The trial court granted defendant's motion for summary judgment, adhering to the traditional rule which prohibits the individual members of an unincorporated association from suing the association in tort.⁹⁸

The traditional rule of non-liability for an association is grounded on concepts dealing with partnerships. A partnership is formed by individual members who each control the operations of the partnership, and each partner represents the partnership in the transaction of its business. The members of an unincorporated association are similar to the partnership parties in that they, too, form the association and have the legal right to control the business of the association. In such a joint enterprise each individual is both principal and agent for all the members of the association and the negligence of any member will then be imputed to all of the members.⁹⁹

These technical factors will often have little relevance to a modern unincorporated association because the association's business is likely to be carried out through elected officials, and the individual members have little input in association decisions or exert little control over the association's daily operations.

Both California, in *White v. Cox*,¹⁰⁰ and Ohio, in *Tanner v. Columbus Lodge No. 11, Loyal Order of Moose*,¹⁰¹ have rejected the tradi-

⁹⁷376 N.E.2d 521 (Ind. Ct. App. 1978).

⁹⁸*Id.* at 522.

⁹⁹See *Marshall v. International Longshoremen's & Warehousemen's Union*, 371 P.2d 987, 22 Cal. Rptr. 211 (1962).

¹⁰⁰17 Cal. App. 3d 824, 95 Cal. Rptr. 258 (1971).

¹⁰¹44 Ohio St. 2d 49, 337 N.E.2d 625 (1975).

tional rule and have held that an unincorporated association is entitled to general recognition as a separate legal entity apart from its members and, thus, a member of the association can sue the association in tort. To help support its conclusion, the *White* court noted the development of California statutory and case law limiting the liability of individual members for the debt of the association.

Similarly, the court in *O'Bryant* placed substantial emphasis on Indiana Trial Rule 17(E) which states:

A partnership or an unincorporated association may sue or be sued in its common name. A judgment by or against the partnership or unincorporated association shall bind the organization as if it were an entity. A money judgment against the partnership or unincorporated association shall not bind an individual partner or member unless he is named as a party or is bound as a member of a class in an appropriate action.¹⁰²

The court noted that Trial Rule 17(E) can be effective as a rule of both procedural and substantive law and concluded that an unincorporated association should be an artificial entity separate from the members.¹⁰³ In this way associations can still serve as "principals of their officers, agents, and employees without need to resort to the fiction that the members of the association are the principals."¹⁰⁴

D. Statutory Developments

The Indiana General Assembly produced no noteworthy statutory developments in the corporation law area. However, the recent decision of the Fifth Circuit Court of Appeals in *Great Western United Corp. v. Kidwell*,¹⁰⁵ affirming a district court's ruling holding the Idaho Corporate Takeover Act¹⁰⁶ unconstitutional, casts doubt on the constitutionality of all state statutes regulating corporate tender offers¹⁰⁷ including the Indiana Business Takeover

¹⁰²IND. R. TR. P. 17(E).

¹⁰³376 N.E.2d at 523.

¹⁰⁴*Id.*

¹⁰⁵[1978] FED. SEC. L. REP. (CCH) ¶ 96,529 (5th Cir. Aug. 10, 1978).

¹⁰⁶IDAHO CODE §§ 30-1501 to 1513 (Supp. 1977).

¹⁰⁷The following states have enacted statutes regulating corporate takeovers: ALASKA STAT. §§ 45.57.010 - .120 (Supp. 1976); COLO. REV. STAT. §§ 11-51.5-101 to 108 (Supp. 1976); CONN. GEN. STAT. §§ 36-347a to 347n (Supp. 1976); DEL. CODE ANN. tit. 8, § 203 (Supp. 1977); 1977 Fla. Laws ch. 77-441; GA. CODE ANN. §§ 22-1901 to 1915 (Supp. 1977); HAWAII REV. STAT. §§ 417E-1 to 15 (1976); IDAHO CODE §§ 30-1501 to 1513 (Supp. 1978); IND. CODE §§ 23-2-3-1 to 12 (1976 & Supp. 1978); KY. REV. STAT. §§ 292.560 - .630 (Supp. 1976); LA. REV. STAT. ANN. §§ 51:1500 - :1512 (West Supp. 1978); MD. CORPS. & ASS'NS CODE ANN. §§ 11-901 to 908 (Supp. 1977); MASS. ANN. LAWS ch. 110C, §§ 1 - 13

Act.¹⁰⁸

In 1971, Great Western United, a Delaware corporation, announced a tender offer for 2,000,000 shares¹⁰⁹ of the stock of Sunshine Mining Company. Sunshine Mining was incorporated under Washington law but over fifty percent of its assets and its corporate headquarters were located in Idaho.¹¹⁰ Great Western initially complied with the disclosure requirements of the Williams Act amendments to the Securities Exchange Act of 1934¹¹¹ and then attempted to comply with the more stringent disclosure provisions of the Idaho takeover law. After the Idaho Securities Commissioner determined that the disclosed information was inadequate, Great Western filed suit to prevent the enforcement of the statute, alleging that the state law was pre-empted by the provisions of the Williams Act and placed an undue burden on interstate commerce. The district court found the statute unconstitutional on both grounds,¹¹² and the decision was appealed.

After resolving several procedural issues,¹¹³ the court first addressed the pre-emption issue.¹¹⁴ This doctrine gives effect to the

(Michie/Law Co-op Supp. 1977); MICH. COMP. LAWS ANN. §§ 451.910 - .917 (Supp. 1977); MINN. STAT. ANN. §§ 80B.01 - .13 (West Supp. 1978); MISS. CODE ANN. §§ 75-72-1 to 23 (Supp. 1977); NEV. REV. STAT. §§ 78.376 - .3778 (1973); N.H. REV. STAT. ANN. 421-A-1 to A-15 (1977); N.Y. BUS. CORP. LAWS §§ 1601 - 1613 (McKinney Supp. 1977); OHIO REV. CODE ANN. § 1707.041 (Page Supp. 1978); PA. STAT. ANN. tit. 70, §§ 71 - 85 (Purdon Supp. 1978); S.D. COMPILED LAWS ANN. §§ 47-32-1 to 47 (Supp. 1978); TENN. CODE ANN. §§ 48-2101 to 2114 (Supp. 1977); UTAH CODE ANN. §§ 61-4-1 to 13 (Supp. 1976); VA. CODE §§ 13.1-528 to 541 (1978); WIS. STAT. ANN. §§ 552.01 - .25 (West 1978). See generally Galanti, *Business Associations*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 27 (1977).

¹⁰⁸IND. CODE §§ 23-2-3-1 to 12 (1976 & Supp. 1978).

¹⁰⁹The offer represented approximately 35% of Sunshine's outstanding stock. Sunshine's board of directors, dissatisfied with Great Western's offer of \$15.75 per share, characterized the offer as "unfriendly."

¹¹⁰Under IDAHO CODE § 30-1501(6) (Supp. 1978), the Idaho Takeover Act applied if the target company had a substantial portion of its assets or its principal office in Idaho.

¹¹¹15 U.S.C. §§ 78m(b) - (c), 78n(d) - (f) (1976).

¹¹²439 F. Supp. 420 (N.D. Tex. 1977). The court of appeals decision elicited national interest and *amici curiae* briefs were filed on behalf of Connecticut, Ohio, Mississippi, Louisiana, New York, Utah, and the Securities and Exchange Commission.

¹¹³Among the plethora of defenses to Great Western's suit were jurisdiction, venue, and service. All defenses were rejected by the court. [1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,095-102.

¹¹⁴In 1968 Congress enacted the Williams Act, the principle federal statute which regulates the use of cash tender offers and which may pre-empt a corresponding state statute. The use of cash tender offers increased from under 10 in 1960 to over 100 in 1966. See E. ARANOW & H. EINHORN, TENDER OFFERS FOR CORPORATE CONTROL 65 n.3 (1973). The Williams Act was designed to provide information to investors so they would be reasonably informed of the substance of the tender offer and could then make a better-reasoned decision. The Act requires the corporation making the tender offer to disclose to the SEC its background, the course and amount of the considera-

supremacy clause of the United States Constitution.¹¹⁵

The court recognized that Congress did not intend to completely exclude all state regulation of securities. Section 28 of the Securities Exchange Act of 1934¹¹⁶ provides that state securities regulation is permissible as long as it does not conflict with federal law. Even if federal law does not completely exclude state regulation, however, the state statute must fail if it conflicts with the federal statute and frustrates the full purposes and objectives of Congress.¹¹⁷

After identifying the relevant criterion to be applied, the court analyzed the purposes of the Williams Act. The court concluded the recent Supreme Court decision in *Piper v. Chris-Craft Industries, Inc.*,¹¹⁸ held that the primary purpose behind the Williams Act is to protect investors. The Supreme Court noted in *Piper* that neutrality between the target company and the corporation attempting the takeover is but one of the characteristics toward protecting investors.¹¹⁹

State corporate takeover statutes generally require disclosure of more information than is required under the Williams Act,¹²⁰ and provide that the disclosure be made before the effective date of the tender offer.¹²¹ The Idaho takeover statute also provided for a hearing to determine the fairness of the tender offer.¹²² The *Great Western* court found that the Idaho statute increased a target company's ability to defeat a tender offer. The court identified the advance notice of the tender offer, the ability to delay the offer through the use of a hearing, and the ability of the target corpora-

tion, any other interests held in the target company, and the purpose of transaction. The post-effective waiting period gives the shareholders a chance to make their informed investment decisions.

¹¹⁵U.S. CONST. art. VI, cl. 2. See *Goldstein v. California*, 412 U.S. 546 (1973); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹¹⁶15 U.S.C. § 78bb(a) (1976). See *SEC v. National Sec. Inc.*, 393 U.S. 453, 461 (1969). Section 28 of the Securities Exchange Act of 1934 has been widely used to help justify the existence of state takeover laws. When the Williams Act was promulgated, only one state, Virginia, had a corporate takeover law. Thus, it can be argued that, although § 28 preserves existing Blue Sky laws, there was no intent to preserve the later adopted takeover laws.

¹¹⁷[1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,102-03.

¹¹⁸430 U.S. 1 (1977).

¹¹⁹*Id.* at 29.

¹²⁰Schedule 13D was the disclosure form required for Great Western when it made its tender offer. The current required disclosure form is Schedule 14D. Compare Schedule 14D-1, 17 C.F.R. § 240.14d-4 (1977) with IND. CODE § 23-2-3-2 (1976).

¹²¹See, e.g., IND. CODE § 23-2-3-2(b) (1976).

¹²²IDAHO CODE § 30-1503(4) (Supp. 1978). Idaho is not alone in the hearing requirement. See, e.g., IND. CODE § 23-2-3-2(e) (1976); MINN. STAT. ANN. § 80B.03 subd. 4 (West Supp. 1978); VA. CODE § 13.1-531(a) (Supp. 1978); WIS. STAT. ANN. §§ 552.05(4) - (5) (West 1978).

tion's board of directors to exclude the offer from state regulations by approving the offer as factors weighing in favor of the target company's management.¹²³ The Idaho Director of Finance¹²⁴ asserted that these pro-management provisions were not meant to prevent tender offers but instead to help directors fulfill their fiduciary duties to shareholders by allowing additional time to assess the tender offer. This novel "fiduciary approach" to investor protection was unpersuasive to the court. It held that the Williams Act contemplated a "market approach" to investor protection where the investor and not the management of the target company evaluates the tender offer.¹²⁵ These elements were more than enough to convince the court that the Idaho statute conflicted with the Williams Act and was thereby pre-empted.¹²⁶

After deciding the pre-emption issue, the court examined the Idaho statute to see if it imposed an undue burden on interstate commerce. The commerce clause¹²⁷ is designed to promote flexibility and commercial activity between states.¹²⁸ The interstate movement of securities is within the scope of the commerce clause. In determining if a state law unreasonably burdens interstate commerce, the court used the analysis found in *Pike v. Bruce Church, Inc.*,¹²⁹ first examining to see if the law promoted a legitimate local interest, then assessing the burden the law placed on interstate commerce, and, finally, balancing the burden and the benefit.

The court noted that any attempt to justify the Idaho legislation based on safeguarding the local economy would fail, but accepted the regulation of changes in management, by outsiders, as a legitimate local interest.¹³⁰ The incumbent management of the corporation has an impact on local lifestyle through various civic activities and may be more responsive to local interests than would outside management. The court accepted the regulation of the

¹²³[1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,105.

¹²⁴The original defendant in the district court case, Thomas L. Kidwell, the Attorney General of Idaho, elected not to appeal the case.

¹²⁵[1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,106.

¹²⁶The court concluded that the provisions of the Idaho law would cause delay for the acquiring corporation and that delay is one of the most effective means of defeating a tender offer. *Id.* at 94,105. See also D. AUSTIN & J. FISHMAN, CORPORATION IN CONFLICT: THE TENDER OFFER 127 (1970); Wilmer & Landy, *The Tender Trap: State Takeover Laws and Their Constitutionality*, 45 FORDHAM L. REV. 1, 9 (1976-77). Prior courts have also noted that delay is the target company's strongest ally. *Copperheld Corp. v. IMETAL*, 403 F. Supp. 579, 608 (W.D. Pa. 1975).

¹²⁷U.S. CONST. art. I, § 8, cl. 3.

¹²⁸See *National Bellas Hess, Inc., v. Department of Revenue*, 386 U.S. 753, 760 (1967).

¹²⁹397 U.S. 137 (1970).

¹³⁰[1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,109.

means by which outsiders can change management as a legitimate local interest.¹³¹ This interest may be significant, especially in smaller Indiana communities where local management can have a significant impact on local lifestyle.

It was also argued that the Idaho takeover law was designed to protect investors. While accepting this as a legitimate purpose, the court noted that Idaho had little reason to protect shareholders of other states unless the securities transaction took place in Idaho or would substantially affect Idaho's shareholders.¹³² Only about two percent of Sunshine Mining's shareholders resided in Idaho. The state had a local interest in protecting these shareholders but, even if no shareholders had resided in Idaho and no securities transaction had taken place in Idaho, the takeover law still would have applied because Sunshine had fifty percent of its assets and its principal place of business within the state boundaries of Idaho.¹³³

In examining the burden on interstate commerce, the court concluded that the Idaho statute disrupted normal securities markets through the advance notification procedure,¹³⁴ and, in this case, the court noted that the Idaho statute effectively stopped over thirty-one million dollars of interstate commerce.¹³⁵ The requirements of a state exercising control over a tender offer will prevent an acquiring company from making any tender offer until the state requirements are satisfied.

When the court attempted to balance the interest and the burden, the result was apparent. The local interest in protecting Idaho investors, in this case a very small percentage of the shareholders, and the indirect and incidental interests of corporate civic responsibility through fuller disclosure were not persuasive when weighed against Idaho's extraterritorial regulation of tender offers which could interfere with securities transactions all over the country. Thus, the court concluded the Idaho statute imposed an undue burden on interstate commerce.¹³⁶

If the Fifth Circuit Court of Appeal's result is affirmed on appeal to the United States Supreme Court, it seems apparent that the Indiana Business Takeover Act is also unconstitutional. The Indiana Act requires substantially more disclosure than the provisions of the Williams Act. In addition, Indiana also provides for a hearing

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* The Indiana Business Takeover Act also applies if a target company is organized under Indiana law, has its principal place of business in Indiana, or has a substantial portion of its total assets in Indiana. IND. CODE § 23-2-3-1(j) (1976).

¹³⁴[1978] FED. SEC. L. REP. (CCH) ¶ 96,529, at 94,109.

¹³⁵*Id.* at 94,110.

¹³⁶*Id.* at 94,112.

and seems to follow the "fiduciary approach" rejected by the *Great Western* court by excluding tender offers approved by the board of directors of the target company from the definition of a "takeover offer."¹³⁷ Finally, the Indiana law also does not require that a majority of the shareholders of the target company reside in Indiana. Instead, the Indiana statute may be effective where the target company was incorporated in Indiana, or had its principal place of business in Indiana, or had a substantial portion of its assets in Indiana.¹³⁸

LEX L. VENDITTI

VII. Criminal Law and Procedure

*Richard P. Good**

The decisions discussed in this Article deal solely with criminal procedure. There have been no appellate decisions on substantive criminal law under the new Indiana Penal Code¹ which became effective October 1, 1977. The discussion is presented in the general order in which the respective issues would arise in the various stages of the criminal process, beginning with pre-trial issues and continuing with issues pertaining to the trial and post-trial stages. In addition, several significant amendments to the penal code during the 1978 session of the General Assembly will be discussed.²

A. Search and Seizure

1. Arrest Warrants.—There are two contrary lines of cases in Indiana on whether warrantless arrests are proper absent exigent circumstances.³ One holds that, in order to have a valid warrantless arrest for a crime not committed in the presence of the officer, there must be probable cause to believe that a crime was committed

¹³⁷IND. CODE § 23-2-3-1(i)(5) (1976).

¹³⁸*Id.* § 23-2-3-1(j).

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The author wishes to express his appreciation to Paul H. Ellison for his assistance in the preparation of this Article.

¹IND. CODE § 35-1-1-1 to 50-6-6 (Supp. 1978).

²See notes 275-88 *infra* and accompanying text.

³See Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 162 (1975).

by the suspect and exigent circumstances that make it impracticable to obtain a warrant.⁴ The other line of cases restates the traditional view that exigent circumstances are not required.⁵ The United States Court of Appeals for the Second Circuit held in *United States v. Reed*⁶ that the fourth amendment⁷ requires exigent circumstances for a warrantless felony arrest, based on probable cause, in the suspect's home.⁸ If *Reed* were followed by Indiana courts, then the traditional approach would be used for the lesser intrusion of a warrantless arrest in public and exigent circumstances would be required only when the officer intrudes into the arrestee's home.⁹

2. *Effect of Illegal Arrest.*—The Indiana Supreme Court twice reiterated the axiomatic doctrine that the illegality of an arrest affects only the admissibility of the evidence obtained as a result of a search following it, but not the right of the state to try the arrestee.¹⁰ In *Mendez v. State*,¹¹ the defendant questioned the credibility of the probable cause affidavit which supported the arrest warrant. The court found no issue for review because the claim related solely to the validity of the defendant's arrest.¹² In *Massey v. State*,¹³ the appellant complained that he was returned to Indiana from Ohio without extradition or waiver of extradition and in violation of the Inter-State Juvenile Compact.¹⁴ The trial court had overruled defendant's motion to dismiss on these facts. The trial court's jurisdiction was held not to depend upon the legality of defendant's

⁴Stuck v. State, 255 Ind. 350, 264 N.E.2d 611 (1970); Throop v. State, 254 Ind. 342, 259 N.E.2d 875 (1970); Bryant v. State, 157 Ind. App. 198, 299 N.E.2d 200 (1973); Johnson v. State, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

⁵Garr v. State, 262 Ind. 134, 312 N.E.2d 70 (1970); Kendrick v. State, 325 N.E.2d 464 (Ind. Ct. App. 1975).

⁶572 F.2d 412 (2d Cir. 1978).

⁷U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁸572 F.2d at 424.

⁹Although the United States Supreme Court has expressly reserved decision on this issue on a number of occasions, the Court has offered important signals pointing to this result. See *United States v. Santana*, 427 U.S. 38 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁰*Massey v. State*, 371 N.E.2d 703 (Ind. 1978); *Mendez v. State*, 367 N.E.2d 1081 (Ind. 1977). In actual practice, some trial courts in Indiana do not follow this rule; instead, they dismiss charges in cases involving an illegal arrest.

¹¹367 N.E.2d 1081 (Ind. 1977).

¹²*Id.* at 1082.

¹³371 N.E.2d 703 (Ind. 1978).

¹⁴IND. CODE § 31-5-3-1 (1976).

arrest or return to the charging state: "This Court has consistently held that an illegal arrest does not destroy a valid conviction and that such illegality is of consequence on review only if evidence was obtained and admitted as a result of that illegal arrest."¹⁵

Dictum in *Pierce v. State*¹⁶ appears to recognize as valid an arrest on less than probable cause. The court wrote that "since the officer had a right to arrest and detain appellant for investigatory reasons on suspicion that he had committed a felony," the alleged illegality of the city court warrant under which defendant was arrested was of no significance and no error was presented.¹⁷

3. *Warrantless Searches.*—The Indiana Court of Appeals in *Bandelier v. State*¹⁸ upheld a search of an area not within the appellant's control at the time of the arrest.¹⁹ After arrest for a traffic offense, the appellant left the police car against orders, returned to his own car, and reached inside. The officer observed a brown paper bag on the suspect's car seat and, upon inspection, discovered marijuana. The court held that appellant's own conduct brought the evidence within the area of his immediate control.²⁰ The Court distinguished *Paxton v. State*²¹ because in that case the officer could no longer reasonably believe that he was in danger or that evidence contained in the automobile could be destroyed by the defendants.²²

The court of appeals in *Griffin v. State*²³ followed *South Dakota v. Opperman*²⁴ and upheld an inventory search²⁵ of an automobile where a police officer arrested the defendant for driving without an operator's license and for false registration of a vehicle and impounded the vehicle pursuant to statute.²⁶ The inventory was made

¹⁵371 N.E.2d at 705 (citing *Williams v. State*, 261 Ind. 385, 304 N.E.2d 311 (1973); *Dickens v. State*, 260 Ind. 284, 295 N.E.2d 613 (1973)). See also *Frisbie v. Collins*, 342 U.S. 519 (1952).

¹⁶369 N.E.2d 617 (Ind. 1977).

¹⁷*Id.* at 619. But see *Dommer v. Hatcher*, 427 F. Supp. 1040, 1045 (N.D. Ind. 1975). "If 'probable cause' is in doubt the 'investigation' must precede the arrest; anything less results in the serious infringement of the Fourth Amendment right to be secure in one's person." *Id.* at 1045.

¹⁸372 N.E.2d 1235 (Ind. Ct. App. 1978).

¹⁹See *Chimel v. California*, 395 U.S. 752 (1969) (holding that a search is limited to the area within the arrestee's immediate control).

²⁰372 N.E.2d at 1237.

²¹255 Ind. 264, 263 N.E.2d 636 (1970).

²²*Id.* at 274-75, 263 N.E.2d at 641. In *Paxton* the court found improper the officers' placing the arrestees in the squad car and then returning to the arrestee's car for the purpose of retaking control of the area in which the evidence was found.

²³372 N.E.2d 497 (Ind. Ct. App. 1978).

²⁴428 U.S. 364 (1976).

²⁵The purpose of an inventory search is to protect the owner's property and to avoid the occasional danger that may arise in impounding an unsearched vehicle. 372 N.E.2d at 501.

²⁶IND. CODE § 9-9-5-5 (1976).

prior to the actual impoundment of the vehicle and in the presence of the defendant, unlike the situation in *Opperman*.

In another type of routine intrusion, the Indiana Supreme Court in *Fair v. State*²⁷ held that a handwriting exemplar, obtained from the defendant at the time he was booked, may be examined without the benefit of a search warrant.²⁸ The court relied upon *Farrie v. State*²⁹ and held that a search incidental to a valid arrest is lawful, even when conducted by a jailer at the time the accused is booked and confined.³⁰ Unlike *Farrie*, the evidence sought and utilized following the inventory search in *Fair* was directly related to the crime for which the arrest had been made. The police action was merely a logical continuation of investigative procedures that were lawful at their inception.³¹

In *May v. State*³² the court of appeals held that where a police officer walked up to the front door of the defendant's residence to ask questions concerning two missing individuals and noticed marijuana in plain view through a window next to the door, the contraband could be seized and was admissible in evidence under the "plain view" doctrine.³³ The police officer was present for a legitimate reason unconnected with a search directed against the accused.³⁴ The same court in another case had also allowed seizure of heroin in plain view of the police arresting the defendant.³⁵

The Indiana Supreme Court in *Gaddis v. State*,³⁶ following *United States v. Robinson*,³⁷ upheld a search of an abandoned "getaway" car which had been driven by a suspect in the murder of a police officer.³⁸ The court held that, because the abandoned car in-

²⁷364 N.E.2d 1007 (Ind. 1977).

²⁸*Id.* at 1013.

²⁹255 Ind. 681, 288 N.E.2d 212 (1971).

³⁰364 N.E.2d at 1013.

³¹In this respect, the police action appears to have been approved by *Chambers v. Maroney*, 399 U.S. 42 (1970); *Whitten v. State*, 263 Ind. 407, 333 N.E.2d 86 (1975); *Luckett v. State*, 259 Ind. 174, 284 N.E.2d 738 (1972).

³²364 N.E.2d 172 (Ind. Ct. App. 1977), *cert. denied*, 98 S. Ct. 1657 (1978).

³³364 N.E.2d at 173.

³⁴The court wrote:

Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.

Id. at 174 (citing *David v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)).

³⁵*Clark v. State*, 363 N.E.2d 1045, 1047 (Ind. Ct. App. 1977).

³⁶368 N.E.2d 244 (Ind. 1977).

³⁷533 F.2d 578 (D.C. Cir.), *cert. denied*, 424 U.S. 956 (1976).

³⁸368 N.E.2d at 248.

volved potential mobility, the exigency of the murder suspect being at large justified the warrantless search under the automobile exception, and there was no error in the admission of evidence found in the car.³⁹ The police's need for information in order to identify and locate the suspect gave rise to the exigent circumstance needed to satisfy the warrantless search exception established in *Warden v. Hayden*.⁴⁰

4. *Search Warrants.*—A controversial case regarding search or seizure, handed down by the United States Supreme Court last term, was *Zurcher v. Stanford Daily*.⁴¹ The Court rejected a broadening interpretation of the fourth amendment made by the lower courts.⁴² The Court held that the fourth amendment does not prevent the issuance of a search warrant to search for evidence when a third party, the owner or possessor of the place to be searched, is not reasonably suspected of criminal involvement.⁴³ The Court also rejected the contention that, if the third party is a newspaper, additional factors, derived from the first amendment, justify nearly a per se rule forbidding the search warrant and permitting only the subpoena duces tecum.⁴⁴ The Court held that, properly administered, search warrant procedures afford sufficient protection to the third party.⁴⁵ The holding in *Zurcher* is consistent with previous decisions of the Court⁴⁶ which were ignored by the trial court: "It is an understatement to say that there is no direct authority . . . for the District Court's sweeping revision of the fourth amendment."⁴⁷

The "fruit of the poisonous tree" doctrine⁴⁸ resulted in a reversal where the "fruit" of an illegal seizure was the basis of a search warrant. In *Stinchfield v. State*,⁴⁹ the court of appeals held that, because a search warrant was based upon a drug which a paid police informant obtained from the defendant's residence by undisclosed means, the trial court erred in overruling defendant's motion to suppress evidence obtained by the search warrant.⁵⁰ The court distinguished

³⁹*Id.*

⁴⁰387 U.S. 294 (1967).

⁴¹98 S. Ct. 1970 (1978).

⁴²353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 98 S. Ct. 1970 (1978).

⁴³98 S. Ct. at 1978.

⁴⁴*Id.* at 1982.

⁴⁵*Id.*

⁴⁶See generally, Moylan, *The Fourth Amendment Inapplicable Vs. The Fourth Amendment Satisfied*, 1977 So. ILL. U.L.J. 75.

⁴⁷98 S. Ct. at 1975.

⁴⁸Wong Sun v. United States, 371 U.S. 471 (1963).

⁴⁹367 N.E.2d 1150 (Ind. Ct. App. 1977).

⁵⁰*Id.* at 1155.

this situation from cases in which the paid informant entered a suspect's house at the latter's invitation and then purchased or otherwise acquired contraband with the consent of the suspect.⁵¹ The court also distinguished, for fourth and fourteenth amendment purposes, searches by private individuals from searches by the state and agents for the state.⁵²

In *Misenheimer v. State*,⁵³ the Indiana Supreme Court considered whether a defendant can attempt to prove that the facts establishing probable cause in a search warrant application were false and, thereby, suppress evidence obtained by the search warrant. The court found that the defendant made no offer to prove that the police officer's affidavit misrepresented facts or that the officer acted in bad faith.⁵⁴

The United States Supreme Court finally addressed this major issue in *Franks v. Delaware*,⁵⁵ two months after *Misenheimer*. The Court held that the fourth amendment allows the defendant to show that the warrant would not have been issued except upon an affidavit given with knowledge of its falsity or in reckless disregard for its truth.⁵⁶ Showing these facts voids the search warrant "and the fruits of the search [are] excluded [from the trial] to the same extent as if probable cause was lacking on the face of the affidavit."⁵⁷ The Court limited this holding by requiring that "to mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine."⁵⁸ The allegation of deliberate or reckless falsehood must be specific and accompanied by an offer of proof. Further, there must be a showing that, without the alleged false statement, there is no probable cause.⁵⁹

⁵¹*Id.* at 1153. See *Mills v. State*, 325 N.E.2d 472 (Ind. Ct. App. 1975).

⁵²367 N.E.2d at 1153. Searches by agents of the state are controlled by the fourth and fourteenth amendments while searches by private individuals are not. See *Zupp v. State*, 258 Ind. 625, 283 N.E.2d 540 (1972); *Machlan v. State*, 248 Ind. 218, 255 N.E.2d 762 (1967). See also *Antrup v. State*, 373 N.E.2d 194 (Ind. Ct. App. 1978), which held that evidence found by defendant's parents and turned over to police was not the subject of an illegal search and seizure.

⁵³374 N.E.2d 523 (Ind. 1978).

⁵⁴*Id.* at 527.

⁵⁵98 S. Ct. 2674 (1978).

⁵⁶*Id.* at 2676-77.

⁵⁷*Id.* at 2677.

⁵⁸*Id.* at 2685.

⁵⁹*Id.* at 2682-83. The Court found six reasons for limiting veracity challenges:

First, . . . the exclusionary rule . . . is not a personal constitutional right, but only a judicially created remedy . . . as a deterrent . . . [and shall not be extended to] interfere[e] with a criminal conviction in order to deter official misconduct.

Second, . . . a citizen's privacy interests are adequately protected by . . .

B. Lineups and Photographic Identifications

The Indiana appellate courts decided several cases involving one-on-one identifications. *Poindexter v. State*⁶⁰ held an in-court identification to be independent of a pre-trial one-on-one identification resulting from an on-the-scene confrontation.⁶¹ *Arkins v. State*⁶² upheld an on-the-scene confrontation ten minutes after the robbery when the police brought the handcuffed suspects to the robbery victim, who thereupon identified them.⁶³ The court of appeals reiterated the rule that “[c]onfrontations occurring immediately after the commission of an offense are not per se unduly suggestive even though the accused is the only suspect present.”⁶⁴ *Dowdell v. State*⁶⁵ held that “in view of the circumstances, the showing of only one picture to [the] victim to identify [the] defendant, was not impermissibly suggestive.”⁶⁶ *Zion v. State*⁶⁷ dealt with an identification problem occurring when the suspect was not in police custody and circumstances suggested that he might flee or further endanger the victim if asked to appear in a police lineup. The rape victim in *Zion* identified the suspect a day and a half after the crime as he appeared outside his place of employment. The court’s holding that this was “not impermissibly and unnecessarily suggestive”⁶⁸ was based on the highly limited scope of identification alternatives available.

sworn affidavit[s] and by the magistrate’s independent determination of sufficiency

Third, . . . the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit [by] question[ing] the affiant, or [by] summon[ing] [other evidence].

Fourth, . . . to make [the magistrate’s] inquiry into probable cause reviewable in regard to veracity [would denigrate his function].

Fifth, permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit.

Sixth and finally, . . . a post-search veracity challenge is inappropriate because the accuracy of an affidavit in large part is beyond the control of the affiant.

Id. at 2682-83.

⁶⁰374 N.E.2d 509 (Ind. 1978).

⁶¹*Id.* at 512.

⁶²370 N.E.2d 985 (Ind. Ct. App. 1977).

⁶³*Id.* at 987.

⁶⁴*Id.* (citing *Wright v. State*, 259 Ind. 197, 285 N.E.2d 650 (1972)).

⁶⁵374 N.E.2d 540 (Ind. Ct. App. 1978). See *Calvert v. State*, 160 Ind. App. 570, 312 N.E.2d 925 (1974).

⁶⁶374 N.E.2d at 542.

⁶⁷365 N.E.2d 766 (Ind. 1977).

⁶⁸*Id.* at 769.

Finally, in lineup cases, the Indiana Supreme Court indicated that the use of video tape in lineups would be an alternative to the presence of counsel in that the existence of a video tape recording would insure accurate reconstruction of the lineup and deter abuses as effectively as counsel.⁶⁹

C. Confessions and Admissions

1. *Voluntariness.*—The state, in a suppression hearing, has the burden to prove beyond a reasonable doubt that the defendant knowingly and intelligently waived his privilege against self-incrimination. The legal standard to be applied is “whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence.”⁷⁰

In *Blatz v. State*,⁷¹ the court of appeals held that the state failed to prove that an eighteen-year-old defendant who had eight years of special education as a slow learner made a voluntary and knowing waiver of his rights to remain silent and to have counsel present during interrogation.⁷² The court, in reversing the conviction, also considered the defendant's detention of more than ninety-six hours prior to making a statement and that he was not taken before a magistrate as required by statute.⁷³ The same result occurred in *Craft v. State*,⁷⁴ where the court of appeals reversed a conviction and held that the state failed to show that the defendant understood his constitutional rights and that he freely and voluntarily waived them.⁷⁵ The defendant, after spending a night in jail on a public intoxication charge, signed a waiver of rights form but twice refused to give a statement. After a third request by the police, the defendant dictated a statement to the officers without the presence of an attorney. This, combined with an erroneous instruction on intoxication, led to the reversal.⁷⁶

In *Antrup v. State*,⁷⁷ the defendant's attorney instructed the police not to interrogate his client and told the client not to speak

⁶⁹Bruce v. State, 375 N.E.2d 1042, 1086 (Ind. 1978) (citing United States v. Wade, 388 U.S. 218, 236-37 (1967)).

⁷⁰Gibson v. State, 257 Ind. 23, 28, 271 N.E.2d 706, 709 (1971) (quoting Nacoff v. State, 256 Ind. 97, 101, 267 N.E.2d 165, 167 (1971)).

⁷¹369 N.E.2d 1086 (Ind. Ct. App. 1977).

⁷²*Id.* at 1088-89, 1090.

⁷³*Id.* at 1088 (citing IND. CODE § 18-1-11-8 (1976)).

⁷⁴372 N.E.2d 472 (Ind. Ct. App. 1978).

⁷⁵*Id.* at 475.

⁷⁶*Id.*

⁷⁷373 N.E.2d 194 (Ind. Ct. App. 1978).

with anyone. The defendant, nevertheless, asked to speak to a state police officer, signed a waiver, and then made the damaging admission. The court concluded that the defendant voluntarily waived those rights.⁷⁸

In several cases the courts upheld the voluntariness of confessions and admissions made when the defendants were under the influence of alcohol or drugs. In *Lee v. State*,⁷⁹ the confession was held to be voluntary even though the defendant was receiving medication "not of the type to overcome his resistance . . .".⁸⁰ Courts held confessions to be valid in other cases in which defendants claimed to be under the influence of drugs or suffering from drug withdrawal.⁸¹ There was conflicting evidence in each of the cases whether the defendants were affected by either the drugs or alcohol, which the trial courts resolved by finding no impairment of defendants' voluntariness in confessing.

A criminal defendant is entitled on motion to a hearing on the issue of voluntariness outside the presence of the jury. The initial determination of voluntariness of a confession is for the court, although the same evidence is admissible to the jury regarding the weight to be given a confession.⁸² A murder conviction was remanded for a hearing before the trial judge on the issue of voluntariness in *Craig v. State*,⁸³ where the trial judge refused the defendant's request for a hearing outside the presence of the jury during trial.

In *Perry v. State*,⁸⁴ the court of appeals held that an interrogating officer's statement to the defendant "that it would look better for defendant 'in court'" if he cooperated, did not constitute an implied promise of immunity or an implied promise or mitigation of punishment so as to render incriminating statements made by defendant inadmissible.⁸⁵

The admissibility into evidence of a confession is determined from the totality of the circumstances, by whether it was made voluntarily.⁸⁶ The circumstances to be considered include whether the confession was freely made, if it were the product of a rational

⁷⁸*Id.* at 197.

⁷⁹370 N.E.2d 327 (Ind. 1977).

⁸⁰*Id.* at 329.

⁸¹*Combs v. State*, 372 N.E.2d 179 (Ind. 1978); *Bean v. State*, 371 N.E.2d 713 (Ind. 1978) (defendant's blood alcohol level was .125, four hours after the crime); *Hill v. State*, 370 N.E.2d 889 (Ind. 1977) (prior to interrogation, defendant consumed valium and mescaline and smoked several marijuana cigarettes); *Robinson v. State*, 371 N.E.2d 718 (Ind. Ct. App. 1978).

⁸²IND. CODE § 35-5-5-1 (1976).

⁸³370 N.E.2d 880, 885 (Ind. 1977).

⁸⁴374 N.E.2d 558 (Ind. Ct. App. 1978).

⁸⁵*Id.* at 559.

⁸⁶*Works v. State*, 362 N.E.2d 144 (Ind. 1977).

intellect, if it were made without compulsion or inducement of any sort, and whether the accused's will was overborne.⁸⁷

2. *Miranda Issues.*—The United States Supreme Court summarized its holding in *Miranda v. Arizona*⁸⁸ as follows: "[T]he prosecution may not use statements . . . stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."⁸⁹

*Bugg v. State*⁹⁰ held that when a police officer, who was a friend of the defendant, visited her in jail to help calm her, and the defendant made self-incriminating statements, this was not interrogation within the meaning of *Miranda*, although certainly it was custodial.⁹¹ Thus, the voluntary statement of the defendant was admissible even though no warnings had been given since the time of arrest.⁹²

Several Indiana cases involved spontaneous incriminating statements made by defendants before the police had an opportunity to give the *Miranda* warnings and were held not to be the products of interrogation and, thus, were properly admitted into evidence.⁹³

In *Lee v. State*,⁹⁴ an incriminating telephone conversation between the unindicted defendant and an accomplice, taped with the accomplice's consent, was held admissible although the defendant was not warned of his *Miranda* rights.⁹⁵ The statement was obviously made while defendant was not in custody.

3. *Massiah Issues.*—The clear rule in *Massiah v. United States*⁹⁶ is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.⁹⁷ In *Jackson v. State*,⁹⁸ the Indiana Supreme Court rejected a *Massiah* objection and upheld a murder conviction where the defendant was in custody for armed robbery, had counsel appointed on that charge, and confessed to an unrelated murder without his attorney's presence.⁹⁹ The court held that the ac-

⁸⁷Murphy v. State, 369 N.E.2d 411 (Ind. 1977) (citing Johnson v. State, 250 Ind. 283, 235 N.E.2d 688 (1968)).

⁸⁸384 U.S. 436 (1966).

⁸⁹*Id.* at 444 (emphasis added).

⁹⁰372 N.E.2d 1156 (Ind. 1978).

⁹¹*Id.* at 1158.

⁹²*Id.* at 1157.

⁹³Cooper v. State, 372 N.E.2d 1172, 1173 (Ind. 1978); Seay v. State, 363 N.E.2d 1063, 1065-66 (Ind. Ct. App. 1977); Roby v. State, 363 N.E.2d 1039, 1042 (Ind. Ct. App. 1977).

⁹⁴369 N.E.2d 1083 (Ind. Ct. App. 1977).

⁹⁵*Id.* at 1085.

⁹⁶377 U.S. 201 (1964).

⁹⁷*Id.* at 206.

⁹⁸375 N.E.2d 223 (Ind. 1978).

⁹⁹*Id.* at 225.

cused's right to counsel was not violated since no formal charge with respect to the murder had been filed and his counsel was appointed only with respect to the armed robbery charge.¹⁰⁰ The confession was made to the prosecutor without any interrogation and, therefore, *Miranda* warnings were not required.¹⁰¹

In a case of first impression, *Walls v. State*,¹⁰² the court of appeals held that it was not error per se for the police to take a statement from a defendant in custody without first notifying counsel that the defendant wished to make a statement.¹⁰³ This fact "should be considered by the trial court with a critical eye along with all other relevant factors when called upon to determine from the totality of the circumstances whether the State has met its heavy burden of proof of showing that the statement was voluntarily made."¹⁰⁴

In *Murphy v. State*,¹⁰⁵ the Indiana Supreme Court held that a murder suspect's confession did not violate his right to counsel when the suspect asked to talk to the police without his attorney: "The defendant can waive his right to have an attorney present when making any statement to the police, just as he could waive any other right."¹⁰⁶

D. Guilty Pleas

1. *Advisement of Rights.*—The Indiana Supreme Court reversed the denial of post-conviction relief where the record of the guilty plea proceedings did not show that the defendant was fully advised of his *Boykin*¹⁰⁷ rights by the trial judge in *Williams v. State*,¹⁰⁸ *Hollingshed v. State*,¹⁰⁹ and *Mack v. State*.¹¹⁰ In *Hollingshed*, the record

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²368 N.E.2d 1373 (Ind. Ct. App. 1977).

¹⁰³*Id.* at 1375.

¹⁰⁴*Id.* The court said it "does not wish to be understood as approving this practice." *Id.*

¹⁰⁵369 N.E.2d 411 (Ind. 1978).

¹⁰⁶*Id.* at 415.

¹⁰⁷*Boykin v. Alabama*, 395 U.S. 238 (1969), held:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 243 (footnote & citations omitted).

¹⁰⁸363 N.E.2d 971 (Ind. 1977).

¹⁰⁹365 N.E.2d 1215 (Ind. 1977).

¹¹⁰373 N.E.2d 1096 (Ind. 1978).

statement that the trial court advised the defendant of his "constitutional right" was not sufficient.¹¹¹ In *Mack*, that the defendant was represented by counsel, and that the court asked if the defendant "[had] any questions?"¹¹² were held insufficient to meet the *Boykin* requirements.¹¹³

The court of appeals in *Pitman v. State*,¹¹⁴ reversed the defendant's conviction where the trial court failed to advise defendant that he was waiving his fifth amendment privilege. This reversal was based on Indiana law¹¹⁵ which codified the *Boykin* requirements for a court to accept a guilty plea. In *Kindred v. State*,¹¹⁶ the court of appeals held that the failure of the trial judge to personally perform each and every advisement required by the statute did not require reversal, absent showing of harm or prejudice, where the record showed that the defense counsel gave the advisements.¹¹⁷

2. *Plea Agreements.*—The United States Supreme Court in *Bordenkircher v. Hayes*¹¹⁸ recognized the "give and take" of plea bargaining and held that due process was not violated when a prosecutor carried out a threat, made during plea negotiations, to have the accused reindicted on more serious charges if he did not plead guilty to the offense originally charged.¹¹⁹ The Court said that plea-

¹¹¹365 N.E.2d at 1215.

¹¹²373 N.E.2d at 1098.

¹¹³*Id.*

¹¹⁴369 N.E.2d 689 (Ind. Ct. App. 1977).

¹¹⁵IND. CODE § 35-4.1-1-3 (1976) states:

The court shall not accept a plea of guilty from the defendant without first addressing the defendant and

(a) determining that he understands the nature of the charge against him;

(b) informing him that by his plea of guilty he is admitting the truth of all facts alleged in the indictment or information or to an offense included thereunder and that upon entry of such plea the court shall proceed with judgment and sentence;

(c) informing him that by his plea of guilty he waives his rights to a public and speedy trial by jury, to face the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(d) informing him of the maximum possible sentence and minimum sentence for the offense charged and of any possible increased sentence by reason of the fact of prior conviction or convictions, and of any possibility of the imposition of consecutive sentences;

(e) informing him that the court is not a party to any agreement which may have been made between the prosecutor and the defense and is not bound thereby.

¹¹⁶365 N.E.2d 776 (Ind. Ct. App. 1977).

¹¹⁷*Id.* at 779 (citing *Ewing v. State*, 358 N.E.2d 204 (Ind. Ct. App. 1976)).

¹¹⁸434 U.S. 357 (1978).

¹¹⁹*Id.* at 365; accord, *Howard v. State*, 377 N.E.2d 628 (Ind. 1978).

bargaining provides advantages to both defendants and prosecutors who want to avoid trials.¹²⁰

Even though a plea agreement was not filed, and the trial court advised the defendant that it would not be bound by any agreement, the court of appeals in *Henry v. State*¹²¹ reversed a guilty plea as involuntarily made because the record showed that the defendant was relying on the prosecutor to recommend sentencing her under the Minor's Sentencing Act.¹²² The trial court did not advise the defendant that the prosecutor failed to make the recommendation and could not make it after acceptance of the guilty plea.

E. Criminal Rule 4—Speedy Trial

1. *Speedy Trial*.—The Indiana Court of Appeals in *Burress v. State*¹²³ held both that the defendant was not denied due process by reason of the lapse of 230 days between the defendant's purchase of heroin and the filing of the information because there was no proof of prejudice, and that the constitutional guarantees of speedy trial are not applicable until a person has been accused of a crime and arrested.¹²⁴

2. *Criminal Rule 4 Issues*.—Indiana Rule of Criminal Procedure 4(F) states that when a delay is caused by the defendant's act, Rule 4 time limitations on prosecution shall be extended by the amount of such delay. In *Bradberry v. State*,¹²⁵ the Indiana Supreme Court held that the delay caused by the defendant's motion for selection of a new panel of judges from which to strike was attributable to the defendant, not to the prospective judges.¹²⁶ In *State v. Hancock County Superior Court*,¹²⁷ the Indiana Supreme Court held that a sixteen-month delay, between the date the defendant struck one name on a panel after a change of judge request and the date the special judge was appointed, was a delay chargeable to the defendant for Rule 4(C) purposes.¹²⁸ Criminal Rule 13¹²⁹ required that a

¹²⁰434 U.S. at 363.

¹²¹370 N.E.2d 972 (Ind. Ct. App. 1977).

¹²²*Id.* at 974.

¹²³363 N.E.2d 1036 (Ind. Ct. App. 1977).

¹²⁴*Id.* at 1037-38; *accord*, *United States v. Lovasco*, 431 U.S. 783 (1977).

¹²⁵364 N.E.2d 1183 (Ind. 1977).

¹²⁶*Id.* at 1186.

¹²⁷372 N.E.2d 169 (Ind. 1978).

¹²⁸*Id.* at 171.

¹²⁹IND. R. CR. P. 13 provides in part:

All of the proceedings hereunder shall be taken expeditiously. It shall be the duty of the party who files an application or motion for change of judge to bring it to the attention of the presiding judge although the opposing party may do so. In all other cases when it becomes necessary to select a special

party filing a change of judge motion bring it to the attention of the presiding judge. Thus, the party filing the motion must take the initiative to see that the proceedings are completed.¹³⁰

In *Smith v. State*,¹³¹ the Indiana Supreme Court held that the time limitations of Criminal Rule 4(B) are inapplicable to an accused incarcerated outside Indiana because the other jurisdiction retains the defendant for the proper purpose of standing trial or serving a sentence.¹³² *Sharpe v. State*¹³³ held that the accused's right to a speedy trial is tested by a balancing approach viewing all the facts.¹³⁴ Among the factors to be considered, apart from Criminal Rule 4 requirements, in determining whether an accused's constitutional rights to a speedy trial have been violated are "the length of delay, the reasons for the delay, the defendant's assertion of his desire for a speedy trial, and the prejudice to the defendant arising from the delay."¹³⁵

3. *Waiver of Criminal Rule 4.*—Where attorneys, representing two defendants joined for trial, were unable to agree on a mutually convenient trial date until after the seventy-day limit, and neither moved for a separate trial, discharge under Criminal Rule 4(B)(1) was not appropriate.¹³⁶ The court was not required to order separate trials on its own motion.¹³⁷

F. Discovery

In *State ex rel. Grammer v. Tippecanoe Circuit Court*,¹³⁸ the Indiana Supreme Court held that interrogatories are never proper in a criminal case if their function can be served by another, allowed, discovery technique and should only be used under exigent circumstances.¹³⁹ The court noted that, while criminal discovery has been expanded by allowing various applications of civil discovery techniques, the very nature of the criminal case setting belies the wisdom of an indiscriminate application of civil discovery procedures.¹⁴⁰ Since criminal discovery is largely discretionary, the trial

judge either party may bring this fact to the attention of the judge authorized to make such selection."

¹³⁰372 N.E.2d at 170.

¹³¹368 N.E.2d 1154 (Ind. 1977).

¹³²*Id.* at 1156; *accord*, *Springer v. State*, 372 N.E.2d 466 (Ind. Ct. App. 1978).

¹³³369 N.E.2d 683 (Ind. Ct. App. 1977).

¹³⁴*Id.* at 686; *accord*, *Springer v. State*, 372 N.E.2d 466, 469 (Ind. Ct. App. 1978).

¹³⁵369 N.E.2d at 686 (citing *Barker v. Wingo*, 407 U.S. 514 (1972); *Collins v. State*, 321 N.E.2d 868 (Ind. Ct. App. 1975)).

¹³⁶*Young v. State*, 373 N.E.2d 1108 (Ind. Ct. App. 1978).

¹³⁷*Id.* at 1110.

¹³⁸377 N.E.2d 1359 (Ind. 1978).

¹³⁹*Id.* at 1361. *Contra*, *Hampton v. State*, 359 N.E.2d 276 (Ind. Ct. App. 1977).

¹⁴⁰377 N.E.2d at 1365.

court is not necessarily bound by the limiting language contained in civil rules.¹⁴¹

The Indiana Supreme Court held that an overly broad discovery motion or order places too great a burden on the state and makes a good faith compliance with discovery difficult to determine.¹⁴² The criteria for determining discovery capabilities were set forth in *Dillard v. State*.¹⁴³ First, there must be a sufficient designation of the items sought to be discovered. Second, the items must be material. Third, the state must make a showing of paramount interest in non-disclosure.¹⁴⁴

In the event of noncompliance with discovery, the trial court has broad discretion in imposing sanctions, from granting a continuance to excluding evidence or striking the testimony of a surprise witness. The rationale for limits on discovery in criminal cases is that the trial judge must regulate the proceedings to insure fairness and to obtain such economy of time and effort as is commensurate with the rights of both society and the defendant. Therefore, the enforcement of discovery orders and the sanctions to be invoked are in the trial judge's discretion and should not be overturned absent clear error.¹⁴⁵

Butler v. State,¹⁴⁶ reversed a conviction where the trial court denied a motion for continuance when a surprise witness was called by the state. In *Hall v. State*,¹⁴⁷ reversal resulted from failure of the state to comply with a discovery order.

In *Reid v. State*,¹⁴⁸ the Indiana Supreme Court upheld the trial court's denial of the defendant's motion to strike a rebuttal witness' testimony where the identity of the witness was not disclosed as required by a discovery order, and held that the defendant was entitled to no more than a continuance, but that, since he did not move for a continuance, the error was waived.¹⁴⁹ The court found a continuance to be the proper remedy for a violation of a discovery order unless exclusion of the undisclosed evidence is needed to protect the defendant's fair trial rights or to deter bad faith violations.¹⁵⁰

¹⁴¹*Id.* (citing *State ex rel. Keller v. Criminal Court*, 317 N.E.2d 433 (Ind. 1974); *Gutowski v. State*, 354 N.E.2d 293 (Ind. Ct. App. 1976)).

¹⁴²*Brandon v. State*, 374 N.E.2d 504 (Ind. 1978); *Reid v. State*, 372 N.E.2d 1149 (Ind. 1978).

¹⁴³257 Ind. 282, 274 N.E.2d 387 (1971).

¹⁴⁴*Id.* at 291-92, 274 N.E.2d at 392.

¹⁴⁵*Reid v. State*, 372 N.E.2d 1149, 1155 (Ind. 1978).

¹⁴⁶372 N.E.2d 190 (Ind. Ct. App. 1978).

¹⁴⁷374 N.E.2d 62 (Ind. Ct. App. 1978).

¹⁴⁸372 N.E.2d 1149 (Ind. 1978).

¹⁴⁹*Id.* at 1155.

¹⁵⁰*Id.*

Ottinger v. State,¹⁵¹ held that the trial court properly refused to allow the defendant to call two witnesses who were not disclosed to the state until the day of trial.¹⁵² The defendant answered interrogatories by stating that he intended to present no witnesses. The defendant had more than six months to notify the state of his changed intentions and failed to do so until the day of trial.

In *Wright v. State*,¹⁵³ the Indiana Supreme Court reversed the lower court's grant of post-conviction relief. The trial court had found a *Brady v. Maryland*¹⁵⁴ violation based on the prosecutor's failure to disclose that the victim may have viewed the defendant's criminal record before identifying the defendant at police headquarters.¹⁵⁵

The supreme court, following the *United States v. Agurs*¹⁵⁶ interpretation of the *Brady* rule, held that nondisclosure by the prosecutor was not material in the constitutional sense, the creation of reasonable doubt being mere speculation.¹⁵⁷ The standard of materiality defined in *Agurs* limits the *Brady* rule to omitted evidence that "creates a reasonable doubt that did not otherwise exist."¹⁵⁸ Moreover, "the omission must be evaluated in the context of the entire record."¹⁵⁹ In *Walker v. State*¹⁶⁰ the court held that there was no error in failing to disclose a "deal" made with the state's witness by police officers when the promise of consideration was made without authority of the prosecutor and the prosecutor later told the witness that there was no promise and that she would be prosecuted.¹⁶¹

The Indiana Supreme Court in *Bruce v. State*¹⁶² disagreed with the court of appeals in *Hampton v. State*.¹⁶³ *Hampton* held that the prosecutor, when responding to a pre-trial notice of alibi, is required to state only the date and place of the offense, because there are discovery devices available to the accused for determining the time of day at which the offense occurred.¹⁶⁴ The supreme court said that

¹⁵¹370 N.E.2d 912 (Ind. Ct. App. 1977).

¹⁵²*Id.* at 916.

¹⁵³372 N.E.2d 453 (Ind. 1978).

¹⁵⁴373 U.S. 83 (1963).

¹⁵⁵372 N.E.2d at 455.

¹⁵⁶427 U.S. 97 (1976).

¹⁵⁷372 N.E.2d at 455.

¹⁵⁸*Id.* (quoting *United States v. Agurs*, 427 U.S. at 112).

¹⁵⁹*Id.*

¹⁶⁰372 N.E.2d 739 (Ind. 1978).

¹⁶¹*Id.* at 740.

¹⁶²375 N.E.2d 1042 (Ind. 1978).

¹⁶³359 N.E.2d 276 (Ind. Ct. App. 1978), discussed in Wilcox, *Criminal Law and Procedure, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 122, 139 (1977).

¹⁶⁴359 N.E.2d at 278.

the notice of alibi procedure is a special pleading device which requires greater specificity than discovery methods and that the prosecution must provide the time of the offense with reasonable specificity, narrowing the alibi time to less than the twenty-four hour period indicated here by the state.¹⁶⁵

Two recent Indiana cases have upheld the trial court's refusal to allow alibi evidence where the defendant failed to timely file an alibi notice and did not establish good cause for the failure to file.¹⁶⁶ In *Hartman v. State*,¹⁶⁷ the appellate court determined that the trial court's granting the state's motion in limine prohibiting the defendant from testifying regarding his alibi did not violate the defendant's constitutional rights.¹⁶⁸ The court acknowledged that several states and Federal Rule of Criminal Procedure 12.1(d) specifically exempt the defendant's own testimony from the exclusionary sanctions of alibi statutes¹⁶⁹ but followed *Bowen v. State*¹⁷⁰ and *Lake v. State*¹⁷¹ which require exclusion of the defendant's testimony where the defendant fails to either give notice or show good cause for failure to give timely notice.

G. Double Jeopardy and Merger

Jeopardy attaches when a jury is empaneled and sworn as a matter of constitutional law,¹⁷² and does not attach in a bench trial until the court begins to hear evidence.¹⁷³ In *Cabell v. State*¹⁷⁴ the defendant moved to withdraw the case from the jury when the court informed him that the alternate juror had participated in the deliberations. The Indiana Supreme Court held that the defendant's action was tantamount to a motion for a mistrial and, therefore, the double jeopardy clause did not bar his retrial.¹⁷⁵

Double jeopardy considerations bar prosecution for two crimes only when both offenses require proof of the same fact or act. In *Neal v. State*,¹⁷⁶ the Indiana Supreme Court upheld conviction for

¹⁶⁵375 N.E.2d at 1057-58.

¹⁶⁶Riggs v. State, 376 N.E.2d 483 (Ind. 1978); Hartman v. State, 376 N.E.2d 100 (Ind. Ct. App. 1978).

¹⁶⁷376 N.E.2d 100 (Ind. Ct. App. 1978).

¹⁶⁸*Id.* at 104-05.

¹⁶⁹*Id.* at 105.

¹⁷⁰263 Ind. 558, 334 N.E.2d 691 (1975).

¹⁷¹257 Ind. 264, 274 N.E.2d 249 (1971).

¹⁷²Crist v. Bretz, 98 S. Ct. 2156, 2160-61 (1978).

¹⁷³Lee v. United States, 432 U.S. 23, 27 n.3 (1977).

¹⁷⁴372 N.E.2d 1176 (Ind. 1978).

¹⁷⁵*Id.* at 1177 (citing United States v. Dinitz, 424 U.S. 600 (1976)). See also Mooberry v. State, 157 Ind. App. 354, 300 N.E.2d 125 (1973).

¹⁷⁶366 N.E.2d 650 (Ind. 1977).

both robbery and kidnapping against a double jeopardy defense and said that, while carrying away the victim was necessary for the kidnapping conviction, it was not a necessary element of robbery.¹⁷⁷ The court found no factual merger because the robbery had apparently been completed before the defendant kidnapped the victim.¹⁷⁸

The merger doctrine requires that "facts giving rise to the various offenses must be independently supportable, separate and distinct."¹⁷⁹ Armed robbery merged into a felony murder conviction in *Williams v. State*.¹⁸⁰ In *Bean v. State*,¹⁸¹ the court stated that judgment cannot be entered on both premeditated murder and felony murder arising from the same operative facts.¹⁸² The Indiana Supreme Court sua sponte vacated an armed robbery conviction because the defendant had also been convicted of felony murder involving the same robbery.¹⁸³ Where second degree burglary, automobile banditry, and safe burglary arose from same transaction, the Indiana Court of Appeals held that second degree burglary and automobile banditry merged into the safe burglary.¹⁸⁴ Armed robbery was held to merge into inflicting injury in commission of robbery in *Dew v. State*;¹⁸⁵ assault and battery with intent to commit a felony merged into inflicting injury in the commission of a felony.¹⁸⁶ *Martin v. State*¹⁸⁷ held that the defendant could not be separately sentenced for possession of three different drugs found by police during an arrest.¹⁸⁸ A defendant cannot be sentenced for both armed rape and rape.¹⁸⁹ The Indiana Supreme Court in *Sansom v. State*¹⁹⁰ held that theft and automobile banditry merged into burglary.¹⁹¹

The court of appeals held in *Elmore v. State*¹⁹² that theft merged into conspiracy¹⁹³ and, in *Davis v. State*,¹⁹⁴ that assault and battery

¹⁷⁷*Id.* at 651-52.

¹⁷⁸*Id.* at 652.

¹⁷⁹*Thompson v. State*, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972).

¹⁸⁰373 N.E.2d 142 (Ind. 1978).

¹⁸¹371 N.E.2d 713 (Ind. 1978).

¹⁸²*Id.* at 716. See also *Smith v. State*, 373 N.E.2d 884 (Ind. 1978).

¹⁸³*Sims v. State*, 368 N.E.2d 1352, 1356 (Ind. 1977).

¹⁸⁴*Swinehart v. State*, 372 N.E.2d 1244, 1249 (Ind. Ct. App. 1978).

¹⁸⁵373 N.E.2d 138, 140 (Ind. 1978).

¹⁸⁶*Tessely v. State*, 370 N.E.2d 907, 912 (Ind. 1978).

¹⁸⁷374 N.E.2d 543 (Ind. Ct. App. 1978).

¹⁸⁸*Id.* at 545.

¹⁸⁹*Goffe v. State*, 374 N.E.2d 560, 561 n.1 (Ind. Ct. App. 1978).

¹⁹⁰366 N.E.2d 1171 (Ind. 1977), overruled by *Elmore v. State*, 1178 S 255 (Ind. Nov. 8, 1978), slip op. at 9.

¹⁹¹*Id.* at 1172 (citing *Hudson v. State*, 354 N.E.2d 164 (Ind. 1976); *Coleman v. State*, 339 N.E.2d 51 (Ind. 1975)).

¹⁹²375 N.E.2d 660 (Ind. Ct. App.), rev'd, 1178 S 255 (Ind. Nov. 8, 1978).

¹⁹³*Id.* at 667.

¹⁹⁴376 N.E.2d 545 (Ind. Ct. App. 1978)

arising from the same offense as second degree burglary merged into the burglary where the facts giving rise to the offenses were not independently supportable, separate, and distinct.¹⁹⁵ The dissent in *Elmore* noted that the Indiana Supreme Court expressly rejected the "same transaction" test for double jeopardy purposes and adopted the "identity of offense" test, and urged that the same test be applied for both double jeopardy and for the sentences arising from the separate crimes.¹⁹⁶ It further stated that merger cases result in freeing the defendant from punishment for an offense he has committed because it arose from the same transaction even though the lesser crime was not necessarily an included offense.¹⁹⁷

H. Right to Counsel

*Goffe v. State*¹⁹⁸ reversed a conviction because defendant was not advised of his right to pauper counsel.¹⁹⁹ An indigent, however, does not have the right to counsel of his own choosing.²⁰⁰

The Indiana Supreme Court, in *German v. State*,²⁰¹ found no error in permitting the defendant to exercise his *Faretta*²⁰² right to represent himself and none in the denial of his pro se request for a continuance to prepare for trial since he fired his attorney the morning the trial was scheduled.²⁰³ Appointment of the fired attorney as standby counsel was permissible as was the court's direction that the attorney assume representation when the defendant said he would not participate in his own defense any further.²⁰⁴ The court held: "A trial judge may terminate self-representation by a defendant who deliberately engages in serious or obstructionist misconduct."²⁰⁵ In *Swinehart v. State*,²⁰⁶ the Indiana Supreme Court held that, while an indigent defendant has a constitutional right to be represented by counsel at state expense and also has the constitutional right to proceed pro se, a defendant had no absolute right to

¹⁹⁵*Id.* at 546.

¹⁹⁶375 N.E.2d at 669 (Buchanan, J., dissenting) (citing *Ford v. State*, 229 Ind. 516, 98 N.E.2d 655 (1951)). The supreme court found that conspiracy to commit theft and theft are separate offenses, for which defendants properly receive separate sentences. *Elmore v. State*, 1178 S 255 (Ind. Nov. 8, 1978), slip op. at 9-11.

¹⁹⁷*Id.* at 667, 668.

¹⁹⁸374 N.E.2d 560 (Ind. Ct. App. 1978).

¹⁹⁹*Id.* at 561. An affidavit attached to the record stated that defendant, in fact, requested counsel by telephoning the judge several days before trial.

²⁰⁰*Shoulders v. State*, 372 N.E.2d 168 (Ind. 1978).

²⁰¹373 N.E.2d 880 (Ind. 1978).

²⁰²*Faretta v. California*, 422 U.S. 806 (1975).

²⁰³373 N.E.2d at 882-83.

²⁰⁴*Id.* at 883.

²⁰⁵*Id.* (citing *Illinois v. Allen*, 397 U.S. 337 (1970)).

²⁰⁶376 N.E.2d 486 (Ind. 1978).

both.²⁰⁷ Allowing such hybrid representation is a matter of trial court's discretion.²⁰⁸

Several cases addressed the issue of effective assistance of counsel and continued the presumption of competency of counsel. The presumption is overcome only by strong and convincing proof: by showing that the attorney's actions or omissions made the proceedings a mockery and were shocking to the conscience of the court.²⁰⁹

In *Logston v. State*,²¹⁰ the court held that, by attacking the competence of his defense counsel, the defendant afforded the attorney the right to fully explain his conduct even if that explanation divulged confidential communications between attorney and client.²¹¹

*Holes v. State*²¹² held that appointment of counsel four days before trial was not per se ineffective assistance, in view of the circumstances that two attorneys previously had withdrawn from the case, that defendant did not use reasonable diligence in securing counsel prior to requesting pauper counsel, that there were only three state's witnesses, and that the prosecutor permitted defense counsel to review the state's entire file.²¹³ However, *Jones v. State*²¹⁴ found ineffective assistance of counsel because the public defender was given less than three hours to consult with the defendant after retained counsel withdrew because he had not been paid.²¹⁵

In two recent cases, the Indiana Supreme Court held that representation of co-defendants by one attorney was not necessarily ineffective.²¹⁶

I. Trial Issues

1. *Evidence.*—In *Smith v. State*,²¹⁷ the court of appeals held that the trial court did not abuse its discretion in finding a six-year-

²⁰⁷*Id.* at 490.

²⁰⁸*Id.* (citing *Bradberry v. State*, 364 N.E.2d 1183 (Ind. 1977)).

²⁰⁹*Dull v. State*, 372 N.E.2d 171 (Ind. 1978); *Lenoir v. State*, 368 N.E.2d 1356 (Ind. 1977). *Contra*, *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977). *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), rejected the "mockery" test and applied a standard based on the "range of competence demanded of attorneys in criminal cases." *Id.* at 543 (citing *McMann v. Richardson*, 397 U.S. 759 (1970)). Counsel error must be so flagrant that it resulted from neglect or ignorance rather than from professional deliberation. 561 F.2d at 544.

²¹⁰363 N.E.2d 975 (Ind. 1977).

²¹¹*Id.* at 977.

²¹²369 N.E.2d 1098 (Ind. Ct. App. 1977).

²¹³*Id.* at 1099.

²¹⁴371 N.E.2d 1314 (Ind. Ct. App. 1978).

²¹⁵*Id.* at 1316.

²¹⁶*Hudson v. State*, 375 N.E.2d 195, 196-97 (Ind. 1978); *Ross v. State*, 377 N.E.2d 634, 636-37 (Ind. 1978); *accord*, *Skinner v. State*, 367 N.E.2d 19, 20 (Ind. Ct. App. 1977).

²¹⁷372 N.E.2d 511 (Ind. Ct. App. 1978).

old victim competent to testify in a prosecution for assault and battery with intent to gratify sexual desires.²¹⁸ The court stated that the competency statute²¹⁹ "is satisfied if the court can find: (1) that the child knows the difference between telling the truth and telling a lie, and (2) that the child realizes that he or she is under some compulsion to tell the truth. The compulsion . . . need not be fear of punishment."²²⁰

The Indiana Supreme Court, in *Ware v. State*,²²¹ upheld the trial court's finding that a twenty-eight-year-old rape victim, with a mental age of seven to nine years, was competent to testify.²²² The defendant had contended that the competency of children statute should apply. The supreme court held that the presumption that any person ten years of age or older is competent could apply and that the record supported the trial court's finding.²²³

Where age of the defendant is an essential element of an offense such as armed robbery under the old penal code²²⁴ and child molesting,²²⁵ incest,²²⁶ and contributing to the delinquency of a minor²²⁷ under the new penal code, the issue of the accused's age should be raised by a motion to dismiss;²²⁸ otherwise, the age element is presumed.²²⁹ If the issue is raised by a motion to dismiss with an attached supporting memorandum,²³⁰ the prosecution must then respond and bear the ultimate burden of proof beyond a reasonable doubt.²³¹

2. *Instructions.*—Even when an instruction on lesser included offenses is appropriate, failure to tender such instruction waives any

²¹⁸*Id.* at 515.

²¹⁹IND. CODE § 34-1-14-5 (1976) renders children less than 10 years old incompetent, "unless it appears that they understand the nature and obligation of an oath."

²²⁰372 N.E.2d at 513. The court did not refer to the general test of competency which is whether the witness has sufficient mental capacity to *perceive*, to *remember*, and to *narrate* the incident he has observed as well as to understand and appreciate the nature and obligation of an oath. *Greco v. State*, 240 Ind. 584, 166 N.E.2d 180 (1960).

²²¹376 N.E.2d 1150 (Ind. 1978).

²²²*Id.* at 1151.

²²³*Id.* at 1151-52. The court discussed the traditional test of competency and the trial court did question the witness concerning the nature and obligation of an oath. *Id.*

²²⁴IND. CODE § 35-12-1-1 (1976) (repealed 1977).

²²⁵*Id.* § 35-42-4-3(c), (d) (Supp. 1978).

²²⁶*Id.* § 35-46-1-3.

²²⁷*Id.* § 35-46-1-8.

²²⁸*Id.* § 35-3.1-1-4 (1976) (amended 1978).

²²⁹*Cox v. State*, 372 N.E.2d 176 (Ind. 1978); *Massey v. State*, 371 N.E.2d 703 (Ind. 1978); *Moore v. State*, 369 N.E.2d 628 (Ind. 1978); *McGowan v. State*, 366 N.E.2d 1164 (Ind. 1977).

²³⁰IND. R. CR. P. 3.

²³¹*McGowan v. State*, 366 N.E.2d 1164, 1165 (Ind. 1977).

error in not giving the requested instruction.²³² The test for determining error in a trial court's refusal to instruct on lesser offenses is whether the lesser offense is necessarily included within the greater offense *and* whether evidence was adduced at trial which applied to the included offense.²³³ In *Sharp v. State*,²³⁴ the supreme court applied this test and found that the defendant was either guilty as charged or was not guilty of any offense since the sole factual issue was identification of the defendant.²³⁵

The United States Supreme Court and the Indiana Supreme Court disagreed on the propriety of giving, over defendant's objections, a cautionary instruction that the jury was not to draw any adverse inferences from the defendant's failure to testify. In *Lakeside v. Oregon*,²³⁶ the United States Supreme Court held such an instruction did not violate the privilege against self-incrimination and did not deprive the objecting defendant of his right to counsel by interfering with his attorney's trial strategy.²³⁷ On the other hand, in *Hill v. State*,²³⁸ decided two months before *Lakeside*, the Indiana Supreme Court found reversible error in the trial court's instruction.²³⁹ The Indiana court stated that choice of trial tactics is within the province of the defendant and his counsel, that the decision to remain silent is an often-used trial tactic, and that the cautionary instruction pointedly notified the jurors that the defendant had some personal reason for not testifying.²⁴⁰

In *Underwood v. State*²⁴¹ the court of appeals held that an instruction that a jury should convict defendant on proof that he was in possession of recently stolen property, absent evidence by the defendant justifying his possession, constituted reversible error.²⁴² The proper instruction is that unexplained exclusive possession of recently stolen property is a circumstance which may be considered, along with other facts and circumstances of the case, and that mere possession of stolen goods is insufficient to support a conviction.²⁴³

²³²*Miller v. State*, 372 N.E.2d 1168, 1171 (Ind. 1978).

²³³*Harris v. State*, 366 N.E.2d 186, 188 (Ind. 1977).

²³⁴369 N.E.2d 408 (Ind. 1977).

²³⁵*Id.* at 410; *accord*, *Lawrence v. State*, 375 N.E.2d 208 (Ind. 1978); *Poindexter v. State*, 374 N.E.2d 509 (Ind. 1978).

²³⁶98 S. Ct. 1091 (1978).

²³⁷*Id.* at 1095.

²³⁸371 N.E.2d 1303 (Ind. 1978).

²³⁹*Id.* at 1306.

²⁴⁰*Id.* As a result of *Lakeside*, *Hill* will not be good precedent unless treated as applicable to Indiana's constitutional provision against self-incrimination. See IND. CONST. art. 1, § 14.

²⁴¹367 N.E.2d 4 (Ind. Ct. App. 1977).

²⁴²*Id.* at 4-5.

²⁴³*Sansom v. State*, 366 N.E.2d 1171 (Ind. 1977) (citing *Gann v. State*, 256 Ind. 429, 269 N.E.2d 381 (1971)).

J. Jury Issues

In *Purdy v. State*,²⁴⁴ the Indiana Supreme Court found reversible error because the trial court sent written preliminary and final instructions to the jury room without reading them in open court.²⁴⁵ The court of appeals reversed a conviction in *Jackson v. State*²⁴⁶ because the trial court sent written notes to the jury in response to notes from the jury without indicating the content of the notes to the defendant. Although the notes may have concerned an innocent subject, such as the menu for a meal or the location of restrooms, prejudice to the defendant had to be presumed and a new trial granted.²⁴⁷ However, in *Foster v. State*,²⁴⁸ the Indiana Supreme Court found no error in the trial court's undisclosed written communication to the jury that the court could not respond to the jury's questions and that the jury must base its verdict on the evidence presented.²⁴⁹

The presence of an alternate juror in the jury room during final deliberation was held, in *Hill v. State*,²⁵⁰ to be reversible error. The Indiana Supreme Court overruled *Hill* in *Miller v. State*²⁵¹ on the ground that "since an alternate is in every respect a juror and is not a stranger to deliberations, no error resulted from his presence during deliberations."²⁵²

In 1970, in *Williams v. Florida*,²⁵³ the United States Supreme Court held that the sixth amendment guarantee of a trial by jury did not require a jury of twelve persons.²⁵⁴ The Indiana Supreme Court in 1975 followed *Williams* and upheld six-man juries under the county court statute²⁵⁵ in *In re Public Laws Nos. 305 & 309*.²⁵⁶ In *Smith v. State*,²⁵⁷ the court of appeals held that a defendant may waive the requirement of a twelve-person jury by personally agreeing to an eleven-member jury.²⁵⁸

²⁴⁴369 N.E.2d 633 (Ind. 1977).

²⁴⁵*Id.* at 636. The court noted that it would be harmless error to send the instructions to the jury after reading them in open court.

²⁴⁶372 N.E.2d 1242 (Ind. Ct. App. 1978).

²⁴⁷*Id.* at 1243.

²⁴⁸367 N.E.2d 1088 (Ind. 1977).

²⁴⁹*Id.* at 1089.

²⁵⁰363 N.E.2d 1010 (Ind. Ct. App. 1977).

²⁵¹372 N.E.2d 1168 (Ind. 1978).

²⁵²*Id.* at 1172.

²⁵³399 U.S. 78 (1970).

²⁵⁴*Id.* at 86. The Court in *Ballew v. Georgia*, 435 U.S. 223 (1978), held a criminal trial jury of fewer than six persons to be unconstitutional. *Id.* at 245.

²⁵⁵IND. CODE § 33-10.5-7-6 (1976).

²⁵⁶263 Ind. 506, 513, 334 N.E.2d 659, 662-63 (1975).

²⁵⁷373 N.E.2d 1112 (Ind. Ct. App. 1978).

²⁵⁸*Id.* at 1113. One of the jurors became ill after the jury had retired to deliberate and the defendant, his counsel, and the prosecutor agreed to an eleven-member jury to decide the case.

K. Sentencing Issues

In *Downs v. State*,²⁵⁹ the Indiana Supreme Court held that the legislature may constitutionally exclude certain crimes from a court's power to suspend sentences.²⁶⁰ Appellant claimed that legislation mandating executed sentences arbitrarily and capriciously excluded persons convicted of certain crimes from the benefits of suspended sentences and, thus, violated the equal protection and due process provisions of the fourteenth amendment. The court, in rejecting this argument, stated that there is no constitutional right to probation or suspended sentences for convicted criminals and that the legislature reasonably considered which classes of crime should be excluded from the possibility of suspended sentences.²⁶¹ The Indiana Supreme Court held that sentences of persons convicted of the same crime need not be consistent.²⁶²

In sentencing under the old habitual criminal statute,²⁶³ the Indiana Supreme Court held: "[T]he life sentence was not imposed as an *additional* sentence to the sentence imposed for the instance crime but was properly imposed as an *alternative* sentence for the instant crime."²⁶⁴ In *Bradberry v. State*,²⁶⁵ the Indiana Supreme Court found no violation of equal protection in allowing a greater sentence to be imposed after a retrial following a successful appeal, but not after a successful post-conviction petition.²⁶⁶

Finally, in *Maynard v. State*,²⁶⁷ the court of appeals held that a defendant, who was convicted of delivering a controlled substance, should have been sentenced under the provision in force at the time of his trial rather than under the harsher sentencing provision in effect at the time of the offense.²⁶⁸ The court used the doctrine of amelioration despite the general saving clause of Indiana Code sec-

²⁵⁹369 N.E.2d 1079 (Ind. 1977).

²⁶⁰*Id.* at 1083.

²⁶¹*Id.* The new penal code limits suspension of sentences. IND. CODE § 35-50-2-2 (Supp. 1978).

²⁶²*Hall v. State*, 371 N.E.2d 700 (Ind. 1978); *cf. Combs v. State*, 260 Ind. 294, 295 N.E.2d 366 (1973) (If there are two separate judicial determinations on the merits, the law imposes consistency as to findings not as to sentences.). See IND. CODE. § 35-41-2-4 (Supp. 1978) for new penal code view.

²⁶³IND. CODE § 35-8-8-1 (1976) (repealed 1977). *But see* IND. CODE § 35-50-2-8 (Supp. 1978) ("A person who is found to be an habitual offender shall be imprisoned for an *additional fixed term* of thirty years" (emphasis added)).

²⁶⁴*Jones v. State*, 369 N.E.2d 418, 421 (Ind. 1977) (quoting *Eldridge v. State*, 361 N.E.2d 155, 159 (Ind. 1977) (emphasis added)).

²⁶⁵364 N.E.2d 1183 (Ind. 1977).

²⁶⁶*Id.* at 1189.

²⁶⁷367 N.E.2d 5 (Ind. Ct. App. 1977).

²⁶⁸*Id.* at 8.

tion 1-1-5-1.²⁶⁹ This decision could have a great impact regarding application of the sentencing provisions of the new penal code for crimes committed before October 1, 1977, and tried after that date, despite the saving clause and the clear legislative intent not to give the new penal code retroactive effect.²⁷⁰

L. Revocation of Probation

The Indiana Supreme Court in *Hoffa v. State*²⁷¹ reversed the court of appeals and held that the defendant's probation could be revoked even though his guilt of a subsequent offense had not been adjudicated.²⁷² The court stated that revocation was proper since there was probable cause to believe that the defendant had committed another crime.²⁷³ This is significant because under the new penal code the state must prove a violation of probation only by a preponderance of the evidence.²⁷⁴

M. Amendments to Penal Code

Several significant amendments to the penal code were made during the 1978 session of the Indiana General Assembly.

1. *Omission.*—Prior to 1978, the omission section stated that a person who did not act committed an offense only if the statute defining the offense imposed a duty of performance.²⁷⁵ This section limited severely the common law doctrine of legal duty to act. The common law imposed a duty in four general categories: (1) Where the duty was expressly provided by statute; (2) where the duty arose from a legal relationship; (3) where the duty sprung from a fac-

²⁶⁹See Conour, *Criminal Justice Notes*, 22 RES GESTAE 174 (1978) (criticizing *Maynard*).

²⁷⁰Act of Apr. 12, 1977, Pub. L. No. 340, § 150, 1977 Ind. Acts 1533 provides in part:

(a) Neither this act nor Acts 1976, P.L. 148 affects: (1) rights or liabilities accrued; (2) penalties incurred; or (3) proceedings begun, before October 1, 1977. Those rights, liabilities and proceedings are continued, and penalties shall be imposed and enforced as if this act and Acts 1976, P.L. 148 had not been enacted.

(b) An offense committed before October 1, 1977, under a law repealed by Acts 1976, P.L. 148 shall be prosecuted and remains punishable under the repealed law.

²⁷¹368 N.E.2d 250 (Ind.), *rev'd* 358 N.E.2d 753 (Ind. Ct. App. 1977); see Wilcox, *Criminal Law and Procedure*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 122, 148 (1977).

²⁷²368 N.E.2d at 252.

²⁷³*Id.*

²⁷⁴IND. CODE § 35-8-2-2(d) (Supp. 1978).

²⁷⁵Act of Apr. 12, 1977, Pub. L. No. 340, § 3, 1977 Ind. Acts 1533, (codified at IND. CODE § 35-41-2-1(a) (Supp. 1978) (amended 1978)).

tual situation, or (4) where the duty was imposed by contract.²⁷⁶ The 1978 amendment²⁷⁷ corrects the defect by providing that a person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty of performance.

2. *Insanity Defense.*—The 1978 General Assembly made several changes in the insanity defense and mental competency proceedings.²⁷⁸ Notice of intent to interpose an insanity defense must be filed within thirty days of entry of a not guilty plea unless good cause is shown for late filing.²⁷⁹ The form for an acquittal verdict has been changed from "not guilty by reason of insanity" to "not responsible by reason of insanity at the time of the offense."²⁸⁰

The most significant change relates to the burden of proof for an insanity defense. In the past, the defendant had the burden of showing some evidence of insanity to rebut the presumption of sanity, whereupon the burden of persuasion shifted to the state to prove the defendant sane beyond a reasonable doubt.²⁸¹ Under the new law, the burden of proof is on the defendant to establish the defense of insanity by a preponderance of the evidence.²⁸²

The competency statutes were amended to eliminate the confusing term "insanity" and to substitute a test for competency—whether the defendant lacks the ability to understand the proceedings and assist in the preparation of his defense.²⁸³ This section also clarifies the nature of competency proceedings.

3. *Check Deception.*—The 1978 General Assembly created a new offense entitled "check deception"²⁸⁴ which amends that portion of the general deception statute concerning bad checks.²⁸⁵ As in general deception, check deception is a Class A misdemeanor. Under the new statute a person does not commit an offense if he pays the payee or holder the amount due plus appropriate fees within twenty days after the mailing of notice that the check has not been paid.²⁸⁶ The deception statute and the present theft section²⁸⁷ provide that a

²⁷⁶See R. PERKINS, CRIMINAL LAW 518 (1957).

²⁷⁷Act of Mar. 8, 1978, Pub. L. No. 144, § 3, 1978 Ind. Acts 1313 (codified at IND. CODE § 35-41-2-1 (Supp. 1978)).

²⁷⁸Act of Mar. 8, 1978, Pub. L. No. 145, §§ 1-8, 1978 Ind. Acts 1322 (codified at IND. CODE § 35-5-2-1 to 3.1-4) (Supp. 1978).

²⁷⁹IND. CODE § 35-5-2-1 (Supp. 1978).

²⁸⁰*Id.* § 35-5-2-3(a)(3).

²⁸¹Fuller v. State, 261 Ind. 376, 383, 304 N.E.2d 305, 310 (1973).

²⁸²IND. CODE § 35-41-4-1(b) (Supp. 1978).

²⁸³*Id.* § 35-5-3.1-1.

²⁸⁴*Id.* § 35-43-5-5.

²⁸⁵*Id.* § 35-43-5-3(a)(2).

²⁸⁶*Id.* § 35-43-5-5(e).

²⁸⁷*Id.* § 35-43-4-5(b).

person does not commit an offense if the person pays the amount due within *ten days* after *receiving* notice that the check was not paid.

The check deception statute also states that the drawee's refusal to pay and reasons thereof printed, stamped, written, or attached to the check constitute *prima facie* evidence that due presentment was made and that the check was dishonored for the reasons stated.²⁸⁸

VIII. Decedents' Estates and Trusts

*Debra A. Falender**

Although the developments during the survey period in the areas of wills, guardianships, and administration of decedents' estates were far from earthshaking, several cases resolved issues of first impression in Indiana.¹ In addition, several sections of the Probate Code were amended.

A. Judicial Developments

1. *Execution of Wills.*—In *Arnold v. Parry*,² the court dealt with a will contestant's allegation that the will admitted to probate was not properly published.³ The statute setting forth the requirements for the due execution of a will provided: "[T]estator shall signify to the attesting witnesses that the instrument is his will."⁴ In *Arnold*, the only surviving witness to the probated will could not positively state that the testator had signified to her that the instrument was his will. She testified that she knew the instrument was

²⁸⁸*Id.* § 35-43-5-5(b).

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¹The title of this discussion is misleading because, during this survey period, no trust cases were decided. In addition to the cases presented in the text, see *Anderson Fed. Sav. & Loan Ass'n v. Guardian of Davidson*, 364 N.E.2d 781 (Ind. Ct. App. 1977) (discussing the impropriety of a court order directing a bank to turn over a ward's savings certificate to the ward's successor guardian because the bank had no opportunity to present evidence of its right to a security interest in the certificate).

²363 N.E.2d 1055 (Ind. Ct. App. 1977).

³The contestant was a beneficiary under a prior will. The contestant raised other issues for review in addition to the publication issue. One issue, involving an allegation of undue influence, is discussed at notes 12-16 *infra* and accompanying text.

⁴IND. CODE § 29-1-5-3(a)(1) (1976) (amended 1978).

the testator's will, but could not remember whether it was the testator or his attorney who had informed her of that fact.⁵ Thus, the contestant argued, absent clear proof that the testator himself told the witness that the instrument was his will, the will was not properly executed.

The *Arnold* court refused to read the statutory language so strictly as to require that the testator alone make the signification by some utterance. The testimony revealed that, in the presence of the witnesses, either the testator or his attorney referred to the instrument as the testator's will. The court held that, even if the testator had not himself referred to the instrument as his will, he properly published the will by signing it after he heard his lawyer tell the witnesses that the document was his will.⁶

The *Arnold* decision is significant because it is the first decision in Indiana to deal directly with the statute's publication requirement. In arriving at its conclusion, the *Arnold* court noted that the purpose of the publication requirement is merely to make sure that the witnesses are aware that the testator knows he is executing a will.⁷ The court also looked to publication cases in other jurisdictions⁸ and to cases dealing with the similar requirement that the testator request the witnesses to attest.⁹ The *Arnold* decision is a

⁵The witness also testified that she did not read the attestation clause above her signature. If she had read the clause, or if it had been read to her, and if the clause had recited that the testator had signified to the witnesses that the instrument was his will, then a rebuttable presumption would have arisen that the recited act occurred. *E.g.*, Goff v. Knight, 201 Okla. 411, 206 P.2d 992 (1948). See 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.141 (rev. ed. 1960). When the clause has been read by or to the witness, it may be used to refresh the memory of the witness or to impeach hostile testimony by the witness. If, however, the clause is not read by or to the witness, the clause creates no presumption that the recited acts occurred. See generally Severns, *The True Function of the Attestation Clause in a Will*, 11 CHI.-KENT L. REV. 11 (1932).

⁶363 N.E.2d at 1061. The court emphasized that the testator was able-bodied and in full possession of his faculties. Thus, whatever was said for him in his immediate presence could, without danger, be taken as understood and adopted by him as his act. If the testator had been old and feeble, the court might have "examine[d] more carefully what [took] place before him." *Id.* at 1060 n.3 (quoting Heath v. Cole, 15 Hun. 100, 103 (N.Y. Sup. Ct. 1878)).

⁷363 N.E.2d at 1058.

⁸Some cases recognize the validity of publication from one other than the testator on agency grounds. *E.g.*, Gilbert v. Knox, 52 N.Y. 125 (1873). Others do not speak in agency terms, but instead talk of the testator's inferred assent to statements made by others in his presence and hearing. *E.g.*, King v. Westerrell, 284 Ill. 401, 120 N.E. 241 (1918).

⁹Indiana has no statutory requirement that the testator request the witnesses to sign the will. However, because of the idea that attestation is necessarily by invitation, it is held that the testator must request the witnesses to attest and subscribe the will. The request from one other than the testator may be assented to and adopted by the

realistic non-technical application of the unambiguous statutory requirement that the testator himself or herself affirmatively signify to the witnesses that the instrument is his or her will. By signing the document after hearing another person inform the witnesses that the document is the testator's will, the testator "is adopting the declaration of the will as his own act and communicating his publication of it to the witness[es] fully and unequivocally."¹⁰ To require that the testator do something more, such as nod his head or murmur, as an absolute prerequisite to a legally operative publication would be to substitute "'a fetish for a rule of reason'" and defeat the purpose underlying the requirement.¹¹

The contestant in *Arnold* also alleged that the question of whether undue influence had been exerted by the testator's lawyer-draftsman should have been submitted to the jury.¹² The contestant posited that the existence of a "long standing friendship and attorney-client relationship"¹³ between the testator and the drafting attorney was evidence from which the jury could have inferred that the attorney exerted undue influence on the client. The court responded: "A preposterous proposition! And one that would virtually sound the death knell for the valid execution of wills."¹⁴

The *Arnold* court recognized that the proposition would not be preposterous, or, in other words, that an inference of undue influence might well be raised, if the attorney or a member of his family were a beneficiary under the will. The court stated, however, that the request in the will that the executor name the draftsman as attorney to the estate raises no legal presumption of undue influence.¹⁵ Even the draftsman's "remote connection" with the Salvation Army, the major beneficiary under the will, raised no inference of undue influence.¹⁶

2. *Will Construction.*—In *Collins v. Held*,¹⁷ the trial court was asked to construe a devise in a 1936 will. In that will, the testator

testator. *Bundy v. McKnight*, 48 Ind. 502, 506-07 (1874) (quoting and following *Gilbert v. Knox*, 52 N.Y. 125 (1873) (statute required that witnesses sign at request of testator; words of request from another will be regarded as request from testator where circumstances show that testator assented to and adopted those words)).

¹⁰363 N.E.2d at 1061 n.5.

¹¹*Id.* at 1061 (quoting *In re Petkos' Will*, 54 N.J. Super. 118, 124, 148 A.2d 320, 323 (1959)).

¹²The trial court had granted defendant's motion for judgment on the evidence.

¹³363 N.E.2d at 1062.

¹⁴*Id.*

¹⁵*Id.* at 1062-63 n.7 (quoting *Breadheft v. Cleveland*, 184 Ind. 130, 133, 108 N.E. 5, 6 (1915) (holding that naming the draftsman executor and trustee creates no legal presumption of undue influence)).

¹⁶363 N.E.2d at 1063. The nature of the "remote connection" is undisclosed in the case.

¹⁷369 N.E.2d 641 (Ind. Ct. App. 1977).

had devised his real estate to his wife for life, then to his daughters for life, then to his grandchildren in fee simple. The devise to the grandchildren was worded in pertinent part as follows:

[I]t is my will that my daughters . . . shall each take and hold the undivided one-half interest in said real estate for and during the term of their natural lives respectively, the fee simple of asid [sic] real estate to be vested in my grandchildren, children of my two said daughters. . . . On the death of either of my said daughters it is my will that *the children of such deceased daughter living at the time of her death* shall take and hold absolutely and in fee simple free and clear of any interest or claim of such surviving daughter the part or interest in said real estate held by their deceased mother as life tenant.¹⁸

The trial court determined that the grandchildren were given a vested remainder, which descended to the heirs of two grandchildren who predeceased their mothers.

Despite the use of the general term "vested," the court of appeals held that the language italicized above unambiguously expressed the testator's intent to create contingent remainders in fee in the grandchildren.¹⁹ Although contingent remainders are not favored in Indiana, and a remainder will be construed as vested if it possibly can be,²⁰ contingent remainders are lawful and will be given effect if the testator by unambiguous language sees fit to create them.²¹ The *Collins* court reaffirmed this principle.

In *Collins*, the court was also required to decide what disposition should be made of a life estate pur autre vie²² following the intestate death of the tenant pur autre vie and prior to the death of the tenant whose life established the duration of the estate. The court adopted the rule embodied in the *Restatement of Property*.²³ The *Restatement* provides that, if no taker has been designated in the original creation or in the transfer of the life estate, then the estate passes to the personal representative of the tenant pur autre vie to

¹⁸*Id.* at 643 (emphasis added).

¹⁹*Id.* at 645. A remainder is contingent if it is subject to a condition precedent. See generally *RESTATEMENT OF PROPERTY* § 157 (1936). Here, the italicized language expresses the condition precedent that the grandchildren must survive their mothers to take their interest.

²⁰*E.g.*, Spence v. Second Nat'l Bank, 126 Ind. App. 125, 130 N.E.2d 667 (1955); Busick v. Busick, 65 Ind. App. 655, 115 N.E. 1025 (1917).

²¹*E.g.*, Epply v. Knecht, 141 Ind. App. 491, 230 N.E.2d 108 (1967); Chicago, I. & L. Ry. v. Beisel, 122 Ind. App. 448, 106 N.E.2d 117 (1952).

²²A life estate pur autre vie is a life estate in one person for the life of another.

²³369 N.E.2d at 648.

be distributed in the same manner as the tenant's personal property.²⁴ Thus, despite dictum in an early Indiana decision suggesting that life estates pur autre vie are not descendable,²⁵ the *Collins* court held that the life estate descended to the heirs at law of the intestate tenant pur autre vie.²⁶

3. *Personal Representative's and Attorney's Fees.*—In *In re Estate of Newman*,²⁷ the Indiana Court of Appeals held that fee awards of \$4,000 for the personal representative and \$8,000 for her attorney were clearly excessive and an abuse of the trial court's statutory discretion to allow "reasonable and just" fees.²⁸ The total value of the decedent's intestate estate was \$37,902.96, and \$29,652.96 of these assets were liquid.²⁹ Forty-three bills were paid by the personal representative during the fifteen-month administration. Four uncontested claims were filed against the estate and paid by the personal representative. Only one contested claim was filed—a claim of \$3,000 for child support, which resulted in an award of \$1,160.

In reviewing the award of attorney's fees, the court emphasized the principle that such awards are best left to the discretion of the trial court.³⁰ In exercising its discretion, however, the trial court should be governed by and confined within the standards widely recognized and accepted by members of the legal profession.³¹ Such standards are found in Disciplinary Rule 2-106 of the Code of Professional Responsibility: "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."³² The court of appeals stated: "[B]eyond all ques-

²⁴RESTATEMENT OF PROPERTY § 151 (1936).

²⁵Graham v. Sinclair, 83 Ind. App. 58, 61, 147 N.E. 634, 635 (1925). The rule at early common law was that a life estate pur autre vie could not descend. Unless the grantor of the life estate designated a taker, on the intestate death of the tenant pur autre vie, the estate could be possessed by the first taker, even a total stranger. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. II, at 259-60 (Sharswood ed. 1872).

²⁶The *Collins* court stated: "Whatever may have been the arcane logic of that rule at common law, its *ratio legis* has long been extinct." 369 N.E.2d at 648.

²⁷369 N.E.2d 427 (Ind. Ct. App. 1977).

²⁸*Id.* at 432-34 (construing IND. CODE § 29-1-10-13 (1976)).

²⁹The decedent owned a \$25,000 certificate of deposit and had \$4,652.96 in a checking account.

³⁰369 N.E.2d at 433 (citing *Ex parte Hodge*, 6 Ind. App. 487, 33 N.E. 980 (1893)).

³¹369 N.E.2d at 433.

³²ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B). The following factors are listed in the Rule as guides in determining the reasonableness of a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

tion, we are left with a definite and firm conviction that the attorney fee awarded . . . is a clearly excessive fee under the guidelines of DR 2-106.”³³

Although no similar standards have been adopted to gauge the reasonableness of a personal representative's fee,³⁴ the court concluded that the “simple nature of this estate, and thus the amount of work necessary to attend to the estate, do not seem to warrant an award of \$4,000 out of total assets of \$37,902.”³⁵

The appellant in *Newman* was decedent's minor heir. The appellant did not attend the hearing on the question of fees. The court held that appellant's absence from the hearing did not bar him from alleging error in the court's award and did not abrogate the statutory standard allowing only a “reasonable and just fee.”³⁶ After the fee award was made, the appellant attempted to conduct discovery in order to attack the award. The *Newman* court, without elaboration, held: “[E]state proceedings are properly subject to discovery rules.”³⁷

- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

³³369 N.E.2d at 433.

³⁴Similar factors are discussed in cases reviewing the reasonableness of a representative's fee. The *Newman* court succinctly noted:

In making the allowances the court may take into consideration the labor performed, the nature of the estate, the difficulties attending the recovery of the assets and location of heirs or devisees, settlements in the estate, the peculiar qualifications of the administrator, her faithfulness and care, and all other factors necessary to aid the court in a consideration fair to the estate and reasonable for the personal representative and the attorney.

Id. at 433 (citing *Pollard v. Barkley*, 117 Ind. 40, 17 N.E. 294 (1888); *Ex parte Hodges*, 6 Ind. App. 487, 33 N.E. 98 (1893)).

³⁵369 N.E.2d at 434.

³⁶*Id.* Appellant could assume that his presence was not “necessary to prevent the award of an unreasonable fee.” *Id.*

³⁷*Id.* An interesting procedural holding prefaced the court's consideration of the *Newman* appeal. The fee awards were ordered December 13, 1973. The appellant did not file a motion to correct errors within 60 days of that order. The court held that the order allowing the payment of fees was an appealable interlocutory order under IND. R. APP. P. 4(B)(1). Newman's failure to appeal the order at that time, however, was not a waiver of his appeal rights. Cf. *Indiana High School Athletic Ass'n v. Raike*, 329 N.E.2d 66 (Ind. Ct. App. 1975) (distinguished by the *Newman* court, 369 N.E.2d at 432, because *Raike* concerned the appealability of orders likely to quickly become moot, unlike the order in *Newman* for payment of money). *Newman* also held that the award of attorney fees was not a final appealable judgment within the meaning of IND. R. TR. P. 54(B). 369 N.E.2d at 431. An estate proceeding is viewed as a single in rem pro-

4. *Sale of Real Estate.*—In *Rainier v. Snider*,³⁸ an intestate decedent's spouse³⁹ contended that an order directing a sale of real estate was improper. The spouse was apparently a second childless spouse and entitled, therefore, to a life estate in one-third of decedent's land.⁴⁰ Indiana Code section 29-1-15-3 provides:

Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

- (a) For the payment of claims allowed against the estate;
- (b) For the payment of any allowance made to the surviving spouse and dependent children under twenty-one (21) years of age of the decedent;
- (c) For the payment of any legacy given by the will of the decedent;
- (d) For the payment of expenses of administration;
- (e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate;
- (f) For making distribution of the estate or any part thereof;
- (g) For any other purpose in the best interests of the estate.⁴¹

The trial court found that the property should be sold for reasons given in sections 3(f) and 3(g). The trial court based its decision on two considerations: (1) The market value of the real estate was at an "apparent all-time high," so that the "sale would bring added monies into the estate,"⁴² and (2) the "high probability of a later suit for partition . . . would result in considerable delay and expense" to the heirs.⁴³

ceeding. IND. CODE § 29-1-7-2 (1976), construed in *Krick v. Farmers & Merchants Bank*, 151 Ind. App. 7, 279 N.E.2d 254 (1972). According to the *Newman* court, the order awarding fees, made in the course of the administration of the estate, would be a final appealable judgment only "upon an express determination that there is no just reason of delay and upon an express direction for the entry of judgment." IND. R. TR. P. 54(B), construed in *In re Estate of Newman*, 369 N.E.2d at 431. Since the court did not make the determination and the direction required by the Rule, the order was an order "as to less than all the claims and parties" and was not final. IND. R. TR. P. 54(B).

³⁸369 N.E.2d 666 (Ind. Ct. App. 1977).

³⁹A major portion of the opinion dealt with whether the appellant was in fact and in law decedent's surviving spouse. See Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 189 (1978).

⁴⁰IND. CODE § 29-1-2-1(b) (1976).

⁴¹*Id.* § 29-1-15-3.

⁴²369 N.E.2d at 671.

⁴³*Id.*

The court of appeals rejected the widow's contention that the sale was not necessary for any of the listed statutory purposes. The court reviewed authority in other jurisdictions with similar statutory language and noted that it has been held that the "purpose of subdivision (f) is to expedite distribution by providing an alternative to an expensive and time-consuming collateral partition proceeding."⁴⁴ Authority diverges as to the purpose and scope of section 3(g). In New York, for example, the phrase "best interest of the estate" allows consideration of the interest of all potential beneficiaries of the estate, including the consideration that the sale of the whole property by the personal representative might result in a higher price than a sale of parcels after partition or might be quicker and easier than a sale of the whole by several beneficiaries.⁴⁵ In Missouri, however, the scope of the phrase "best interest of the estate" is more limited.⁴⁶ The *Rainier* court consulted the Commission Comments to the Indiana statute and concluded that the broader interpretation of section 3(g) is more in line with the legislative intent.⁴⁷ Thus, the trial court's decision that a sale was necessary was properly based upon the two considerations stated above. Further, since the administrator had posted bond to cover any interest to which the widow might be entitled,⁴⁸ the order of sale was not an abuse of the trial court's discretion.

In *Rainier*, the sale at public auction occurred prior to the appeal. Once a sale has been authorized by the court and has occurred, the party objecting to the sale has no meaningful remedy, even if it is later found on appeal that the trial court abused its discretion in ordering the sale.⁴⁹ Furthermore, there is no way to prevent a sale authorized under section (f) or (g). Indiana Code section 29-1-15-4 provides that an order authorizing a sale "for the payment of obligations of the estate *shall* not be granted if any of the persons interested in the estate shall execute and file in the court a bond"⁵⁰

⁴⁴*Id.* (citing *Wade v. Bigham*, 178 Misc. 305, 34 N.Y.S.2d 22 (1941)). The Indiana statute was based upon the New York statute construed in *Wade*. See IND. CODE ANN. § 29-1-5-3, Commission Comments (Burns 1972).

⁴⁵*In re Perkins' Will*, 55 Misc. 2d 834, 286 N.Y.S.2d 586 (1967).

⁴⁶*McIntosh v. Connecticut Gen. Life Ins. Co.*, 366 S.W.2d 409 (Mo. 1963). In explaining the *McIntosh* approach, the *Rainier* court stated: "Under this view, neither the fact that it is desirable to sell land because of inability to satisfactorily partition, nor the fact that the land might bring a higher price as a whole is held related to the administration of the estate." 369 N.E.2d at 670.

⁴⁷369 N.E.2d at 671.

⁴⁸At the time of the sale, the appellant's status as surviving spouse had not been determined. See note 39 *supra*.

⁴⁹The transferred property cannot be recovered because good faith purchasers are protected. See IND. CODE §§ 29-1-10-19, -15-19 (1976 & Supp. 1978).

⁵⁰*Id.* § 29-1-15-4 (1976).

This section, by its explicit language, applies only when a sale is necessary for purposes listed in section 29-1-15-3(a), (b), (d), and (e).⁵¹

5. *Absentee Estates.*—*Overpeck v. Dowd*⁵² was the most factually complicated case decided during the survey period. The appeal was taken from order of heirship entered in the course of the administration of three "absentees"—Alice, Ida, and Laura Hendrixson. The decrees did more than determine heirship; they contemplated distribution of property claimed by the appellant, Brian Overpeck.⁵³ Although Overpeck was not an heir of Alice, Ida, or Laura, the court of appeals found that he was a person aggrieved by the decrees and, therefore, had standing to appeal.⁵⁴ The appellate court then held that the trial court had no jurisdiction to grant letters of administration in the Hendrixson estates.⁵⁵ The statute permitting the opening of absentee estates applies only to persons who at some time have been residents of Indiana.⁵⁶ Since Alice, Ida, and Laura had never been residents of this state, the letters of administration were void.⁵⁷

The administrator of the Hendrixson estates had sold a parcel of real property during the course of the administration, and the sale had apparently been approved by the trial court. At the time of the sale, the administrator was acting under the authority of his letters of administration and under the assumption that Alice, Ida, and

⁵¹*Id.* These are the only sections that authorize a sale for payment of obligations of the estate.

⁵²364 N.E.2d 1043, *modified on rehearing*, 368 N.E.2d 1175 (Ind. Ct. App. 1977).

⁵³The decrees directed the Hendrixson administrator to file his final accounting and petition for distribution and closing of the estates. 364 N.E.2d at 1048. The only property to be distributed from the estates was property in which Overpeck claimed an interest.

⁵⁴*Id.* at 1048 (construing IND. CODE § 29-1-1-22 (1976)). The statute provides in part: "Any person considering himself aggrieved by any decision of a court having probate jurisdiction in proceedings under this code may prosecute an appeal to the court having jurisdiction of such appeal." IND. CODE § 29-1-1-22 (1976).

⁵⁵364 N.E.2d at 1049.

⁵⁶IND. CODE § 29-2-5-1 (1976) provides in part:

When any resident of this state shall have absented himself from his usual place of residence and gone to parts unknown for a period of five (5) years, . . . the court shall have jurisdiction over the estate of such person in the same manner and to the same extent as if he were dead, and shall appoint an administrator of his estate, who shall have all of the powers and rights over such estate and be subject to all of the liabilities and duties in relation thereto that appertain to administrators of decedent's estates.

See id. §§ 32-6-6-1, -2, which provides a procedure for quieting title to real estate claimed by an absent nonresident.

⁵⁷The court stated: "When a court is without jurisdiction, it possesses the power to do nothing except enter an order of dismissal." 364 N.E.2d at 1049 (citing *Squarey v. Van Horne*, 321 N.E.2d 858 (Ind. Ct. App. 1975)).

Laura were the owners of the property. The appellate court, in its original opinion, stated that the trial court did not possess jurisdiction to order the sale.⁵⁸ On rehearing, the court of appeals modified its opinion by recognizing that acts lawfully performed by a personal representative under the apparent authority of letters of administration are valid, even though the authority of the personal representative is subsequently terminated.⁵⁹

The decision of the court regarding the trial court's lack of jurisdiction over the Hendrixson estates was correct in light of the language of the absentee estate statute. The later decision regarding the validity of the acts of the Hendrixson administrator was likewise proper. Other statements in the *Overpeck* opinion, however, are misleading. Because the setting of the case is so unusual, a few comments on the course of events leading up to the appeal are necessary.

The opening of the Hendrixson estates was prompted by a decree in the estate of Ruth Cox Vaught, who died December 9, 1972. Soon after Vaught's estate was opened, the executor of her estate filed a petition for the construction of the will of James W. Puett, who died in 1909. Apparently, the Vaught executor wanted to determine if Vaught owned any of the real estate devised by Puett in his will. James Puett, in his will, devised all his real estate to his wife, Jane, for her life.⁶⁰ Puett devised the remainder interest in one tract (Tract I) of his real estate to a niece and the remainder interest in the rest of his real estate (Tract II) to Ruth Cox Vaught for life, then in fee to the children of Ruth Vaught who survived her, and if no children survived her, in fee to Alice, Ida, and Laura Hendrixson.⁶¹

The trial court, in the Vaught estate proceeding, construed Puett's will and, on January 21, 1974, decreed: (1) Ruth Vaught took only a life estate in Puett's real estate, (2) title to Tract I vested in fee simple in Brian Overpeck at Vaught's death,⁶² and (3) title to Tract II vested in Alice, Ida, and Laura if they had survived Ruth Vaught.⁶³ If Alice, Ida, and Laura had not survived Ruth Vaught, the

⁵⁸364 N.E.2d at 1051.

⁵⁹368 N.E.2d at 1176 (citing IND. CODE § 29-1-10-19 (1976)).

⁶⁰Apparently, Jane was also the residuary beneficiary of Puett's estate. 364 N.E.2d at 1048.

⁶¹*Id.* at 1045-46. This is merely a summary of the language of Puett's will. The language is quoted in part at note 63 *infra*.

⁶²Overpeck was an heir at law of Jane Puett. Apparently, he was also an heir or devisee of the niece who was given Tract I by the terms of James Puett's will. See text accompanying note 61 *supra*.

⁶³Ruth Vaught did not have children. Thus, the alternative devise to Alice, Ida, and Laura was effective. The court in construing Puett's will determined that the

court decreed that the devise of Tract II had lapsed, and title to Tract II vested in the heirs of Puett's wife, Jane, who had been Puett's residuary beneficiary and who had died intestate. Because the court did not know whether Alice, Ida, and Laura had survived Ruth Vaught, the decree stated that the court was without sufficient evidence "to complete the construction of the last will and testament of James W. Puett as to Tract II."⁶⁴ The trial court directed the guardian ad litem appointed to represent Alice, Ida, and Laura to "take such steps as he may deem necessary and proper to protect the interest of said missing heirs under the laws of the State of Indiana pertaining to missing heirs."⁶⁵

The day after this decree in Vaught estate, petitions were filed to open absentee estates for Alice, Ida, and Laura. Soon after the estates were opened, the administrator petitioned the court for interim distribution of Tract II.⁶⁶ The trial court responded to this

devise to Alice, Ida, and Laura not only was subject to the contingency that Ruth Vaught died without children surviving her, but also was subject to the contingency that Alice, Ida, and Laura survive Ruth Vaught. This conclusion seems questionable in light of the lack of survivorship language in reference to Alice, Ida, and Laura. The devise read, in pertinent part, as follows:

Also after the death of my said wife I give and devise the residue of my real estate [Tract II] to said Ruth P. Cox, to have and hold during her life time and upon the death of my said wife and said Ruth, I give and devise said residue of my real estate to the children of said Ruth P. Cox, then living whether they be born before or after my death, it being my intention and will that said residue shall after the expiration of said life estate therein descend to and become the property in fee simple of such child or children as she may hereafter bear and have living at such time whether the same be born before or after my death, but should there be none living at such time then I give and devise such residue of my real estate to the three daughters of my sister Lousia Hendrixson by her second marriage, namely Alice, Ida and Laura.

⁶⁴364 N.E.2d at 1045-46.

⁶⁵364 N.E.2d at 1046.

⁶⁶*Id.* The guardian ad litem had been appointed some time prior to the court's first decree construing Puett's will.

⁶⁷This petition was filed after the court in the Vaught estate, on April 15, 1974, made a nunc pro tunc entry regarding Tract II as follows:

Court further finds that under the language of Item Second of the will of James W. Puett, a remainder interest in all of the remaining real estate owned by James W. Puett at the time of his death, herein referred to as Tract II, was limited to the three daughters of the testator's sister, Lousia Hendrixson, by her second marriage, namely, Alice, Ida and Laura.

⁶⁸364 N.E.2d at 1046. The relevant language of Item Second of the last will of James Puett is quoted at note 63 *supra*. The appellees in *Overpeck* insisted that the language of this nunc pro tunc finding "vested descendible title in Alice, Ida, and Laura." 364 N.E.2d at 1050. The court of appeals disagreed, stating that the language of the finding was ambiguous. *Id.* On the one hand, the language of the finding suggests that the court was no longer committed to its earlier conclusion that the devise to Alice, Ida,

petition by entering an order directing the executor of the Vaught estate to "surrender, turn over and deliver" Tract II to the administrator of the Hendrixson estates.⁶⁷ Subsequently, but before the survivorship status of Alice, Ida, and Laura was determined, Tract II was sold by the Hendrixson administrator. This transaction was the sale referred to at the start of this discussion.⁶⁸

After the sale of Tract II, the court was presented with evidence that Alice, Ida, and Laura had predeceased Ruth Vaught. This discovery prompted another decree in the Vaught estate proceeding.⁶⁹ On June 25, 1975, the trial court decreed that the devises from Puett to Alice, Ida, and Laura had lapsed and that their interests reverted to Puett's estate, passed under Puett's residuary clause to his widow, Jane, and passed upon her death intestate to her heirs.⁷⁰ Brian Overpeck, an heir of Jane Puett, claimed by virtue of this decree an interest in the proceeds of Tract II. Thus, subsequently, when the court in the Hendrixson estates entered the order contemplating distribution of the proceeds,⁷¹ Overpeck brought the present appeal.

The appellees in *Overpeck* were the apparent heirs of Alice, Ida, and Laura. The appellees argued on appeal that Overpeck had waived any claim to the proceeds of the sale of Tract II "when he failed to object to the opening of the Hendrixson estates, the interim distribution from the Vaught estate, and the sale of the real estate by the Hendrixson estates."⁷² Although the *Overpeck* court's conclusion that the trial court was without jurisdiction to administer the Hendrixson estates answered all of the heirs' contentions, the court of appeals nonetheless explained why it would not have found a waiver by Overpeck even if the trial court had possessed jurisdiction. In the course of the explanation, the court reached conclusions that are arguably correct only when read in light of the fact that no appeal was ever taken in the Vaught estate proceeding.

First, the *Overpeck* court stated: "We hold that the trial court had jurisdiction to construe the Puett Will as part of the proceedings in the Vaught estate."⁷³ The only statute cited in support of

and Laura was contingent upon their survival of Ruth Vaught. See discussion in note 63 *supra*. On the other hand, the court, in the April 15 entry, made no order concerning the title to Tract II, only this finding of fact. In a later decree, discussed in the text accompanying note 69 *infra*, the court again attached the condition of survivorship to the devises to Alice, Ida, and Laura.

⁶⁷364 N.E.2d at 1047.

⁶⁸See text accompanying notes 57-58.

⁶⁹This was the third decree in the Vaught estate. The second decree is discussed at note 66 *supra*.

⁷⁰364 N.E.2d at 1046-47.

⁷¹See note 53 *supra* and accompanying text.

⁷²364 N.E.2d at 1049.

⁷³*Id.* at 1051.

this statement was Indiana Code section 29-1-6-5, which provides:

The court in which a will is probated shall have jurisdiction to construe it. Such construction may be made on a petition of the personal representative or of any other person interested in the will; or, if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of such issue. When a petition for the construction of a will is filed during administration of the estate, notice of the hearing thereon shall be given to interested persons. If the estate has been closed prior to the filing of such petition, notice shall be given as in civil actions.⁷⁴

By its explicit language, this section gave the court the authority to construe only the probated will (the Vaught will). It did not give the court the authority to construe another will (the Puett will) even though it was tangentially related to the Vaught probate proceedings. The jurisdiction to construe the Puett will, however, was never challenged. The Hendrixson heirs were represented in the Vaught proceeding by a guardian ad litem appointed to represent their predecessors in interest, Alice, Ida, and Laura.⁷⁵ All the interested parties were apparently represented when the Puett will was construed. Thus, it seems that the decrees construing Puett's will are binding on the parties before the court, even though the court technically did not have jurisdiction to construe that will under section 29-1-6-5.

Second, the *Overpeck* court stated: "[T]he June 25, 1975, decree in the Vaught estate adjudicated vesting of title to Tract II in the heirs of Jane Puett."⁷⁶ In the course of the administration of a decedent's estate, the court exercising probable jurisdiction has the authority to adjudicate title to real estate in only one situation—upon a petition to sell or mortgage real property if the petition to sell or mortgage seeks such relief.⁷⁷ A binding adjudication of

⁷⁴IND. CODE § 29-1-6-5 (1976). The court did not cite the statute establishing the power and jurisdiction of the Parke County Circuit Court. Perhaps, by this statute, the court did have "jurisdiction" to construe the Puett will. *See id.* § 33-4-4-3.

⁷⁵*See id.* § 29-1-1-20(a), (d) regarding the effect of representation by a guardian ad litem.

⁷⁶364 N.E.2d at 1051.

⁷⁷IND. CODE § 29-1-15-12 (1976) provides:

Upon any petition to sell or mortgage real property the court shall have power to investigate and determine all questions of conflicting and controverted title, remove clouds from any title or interest involved, and invest purchasers or mortgagees with a good and indefeasible title to the property

title, however, apparently did, in fact, occur by virtue of the decree in the Vaught estate proceeding. Even though there was no petition for sale or mortgage requesting an adjudication of title, all the interested claimants were represented when the decrees were rendered, and they all were bound by the unappealed final judgment in the Vaught estate.

B. *Statutory Developments*

Several amendments to the Probate Code were enacted during the survey period.⁷⁸ The survivor's allowance provision now provides

sold or mortgaged. When the petition to sell or mortgage seeks such relief notice shall be given as in civil actions of like nature and the court is authorized to issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties.

⁷⁸The following statutory changes should be noted. IND. CODE § 29-1-2-12 (Supp. 1978), *as amended by* Act of Mar. 9, 1978, Pub. L. No. 2, § 2901, 1978 Ind. Acts 568, now provides that a "person who is convicted of murder, causing suicide, or voluntary manslaughter shall . . . become a constructive trustee of any property acquired by him from the decedent or his estate because of the offense . . ." Prior to the amendment, the statute provided that a person "legally convicted of intentionally causing the death of another, or of aiding or abetting therein, shall . . . become a constructive trustee of any property, real or personal, acquired by him from the decedent or his estate because of such death . . ." IND. CODE § 29-1-2-12 (1976). The deletion of the word "legally" is insignificant. The amended statute applies only to persons convicted of the specified offenses. Query whether property acquired *because of the offense* is somehow a less inclusive description than property acquired *because of the death*.

IND. CODE § 29-1-7.5-2(a)(4) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 8, 1978 Ind. Acts 1171, includes the guardian of an heir, legatee, or devisee as a person who must freely consent to and understand the significance of unsupervised administration before a petition for unsupervised administration will be granted. IND. CODE §§ 29-1-7.5-6, -7 (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, §§ 4, 5, 1978 Ind. Acts 1170, provide that the claim of a person under a disability is barred if not asserted within the time periods set forth in these sections. IND. CODE § 29-1-15-19(c) (Supp. 1978), *as added by* Act of Mar. 7, 1978, Pub. L. No. 132, § 10, 1978 Ind. Acts 1173, specifically provides for the protection of good faith purchasers of real estate from an unsupervised personal representative.

IND. CODE § 29-1-8-4.5 (Supp. 1978), *as added by* Act of Mar. 7, 1978, Pub. L. No. 132, § 6, 1978 Ind. Acts 1170, will aid in the collection of small estates by affidavit. The claimant may present his affidavit to the court and receive, without notice or hearing, a court order "that the claimant is entitled to payment or delivery of the property." This should satisfy creditors wary of paying or delivering property on the strength of the affidavit alone.

IND. CODE § 29-1-14-17(a) (Supp. 1978), *as amended by* Act of Mar. 7, 1978, Pub. L. No. 132, § 8, 1978 Ind. Acts 1171, now provides that the personal representative may act upon a claim in his favor which accrued during the decedent's lifetime if "all heirs and legatees who would be affected by the allowance of the claim consent in writing to it." Prior to this amendment, the personal representative's claim was treated as disallowed and transferred for trial in all cases. Now it is treated as disallowed only if all affected heirs and legatees do not consent.

that, if there is no surviving spouse, the "decedent's children who are under eighteen (18) years of age at the time of the decedent's death" are entitled to share equally the \$8,500 allowance.⁷⁹ The prior provision referred to the decedent's "dependent children."⁸⁰ Certainly it will be easier for the courts to apply the age rather than the dependency provision, and probably the same children would take under either description in the vast majority of cases.

Subsection c, added to section 29-1-5-3, specifically provides that a will may be made self-proved by execution of a document "that substantially contains the declarations set out in" the self-proved will provision.⁸¹ The self-proved will provision itself sanctions substantial compliance in the form and content of the declaration.⁸² The amendment merely clarifies, but does not change, existing law.

Previously, section 29-1-15-15 required that specified notice procedures be followed by a personal representative in sales of real property at public auction.⁸³ This section was amended to provide that all sales of real property, whether at public or private sale, may be made with or without notice as directed by the court.⁸⁴ If notice is required by the court, the personal representative "shall give such notice as the court orders."⁸⁵

Since 1972, under the guardianship provisions of the Probate Code, "upon a showing that the ward will probably remain incompetent during his lifetime," a guardian may apply for and receive court authority to dispose of principal or income of the ward's estate in excess of the amount likely to be required for the future care of the ward "in order to effect and carry out such estate planning as the court may determine to be appropriate for the purposes of minimizing current and prospective income and estate or other taxes . . .".⁸⁶

Finally, it should be pointed out that, effective January 1, 1979, the Marion County Probate Court is abolished, and jurisdiction over probate matters will reside exclusively in the newly created Marion County Superior Court. See IND. CODE § 33-5-35.1-4 (Supp. 1978), *as amended by Act of Apr. 21, 1977, Pub. L. No. 313, § 4, 1977 Ind. Acts 1440.*

⁷⁹IND. CODE § 29-1-4-1 (Supp. 1978), *as amended by Act of Mar. 7, 1978, Pub. L. No. 132, § 1, 1978 Ind. Acts 1167.*

⁸⁰IND. CODE § 29-1-4-1 (1976) (amended 1978).

⁸¹IND. CODE § 29-1-5-3(c) (Supp. 1978), *as added by Act of Mar. 7, 1978, Pub. L. No. 132, § 2, 1978 Ind. Acts 1167.*

⁸²IND. CODE § 29-1-5-3(b) (Supp. 1978). The subsection provides that the self-proving declaration must be in "form and content substantially as" worded in the statute.

⁸³*Id.* § 29-1-15-15 (1976) (amended 1978).

⁸⁴*Id.* (Supp. 1978), *as amended by Act of Mar. 7, 1978, Pub. L. No. 132, § 11, 1978 Ind. Acts 1167.* The amended statute adopts for all sales of real estate the rule previously applicable only to private sales.

⁸⁵IND. CODE § 29-1-15-15 (Supp. 1978).

⁸⁶*Id.* § 29-1-18-33(c) (1976) (amended 1978).

This provision has now been made even more flexible by the inclusion of the following language: "In addition, the court may also authorize the guardian to apply or dispose of the excess principal or income for any other purpose the court decides is in the best interest of the ward, his estate, his spouse, or his family."⁸⁷

IX. Domestic Relations

*Helen Garfield**

A. Adoption

1. *Abandonment.*—When a child with living parents is to be adopted, the consent of the child's natural parents is normally required.¹ Certain specific instances where consent is not required are enumerated in the adoption statutes;² the first of these is abandonment.³ Three decisions interpreting the abandonment section were handed down by the Indiana Court of Appeals during the survey period.⁴ None of these cases was concerned with the traditional common law concept of abandonment, which involves an *intentional* relinquishment of *all* parental rights and duties to the child.⁵ They dealt, rather, with the less stringent statutory grounds for dispensing with the consent of a non-custodial parent.⁶ These provisions permit a court to make what is, in effect, a finding of abandonment without the stringent proof of intent to abandon which would otherwise be required.⁷

⁸⁷IND. CODE § 29-1-18-33(c) (Supp. 1978), as amended by Act of Mar. 7, 1978, Pub. L. No. 132, § 11, 1978 Ind. Acts 1167.

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¹IND. CODE § 31-3-1-6(a)(1) (1976).

²*Id.* § 31-3-1-6(g). These include abandonment, voluntary relinquishment of the right to consent, and prior involuntary termination of parental rights. *Id.*

³*Id.* § 31-3-1-6(g)(1).

⁴Rosell v. Dausman, 373 N.E.2d 185 (Ind. Ct. App. 1978); *In re Adoption of Dove*, 368 N.E.2d 6 (Ind. Ct. App. 1977); Young v. Young, 366 N.E.2d 216 (Ind. Ct. App. 1977). *Rosell* and *Young* deal with the statute as it existed prior to the 1975 amendments, Act of Apr. 14, 1971, Pub. L. No. 421, § 1, 1971 Ind. Acts 1962, 1963 (amended 1975, 1978).

⁵See *Murphy v. Vanderver*, 349 N.E.2d 202, 203 (Ind. Ct. App. 1976).

⁶IND. CODE § 31-3-1-6(g)(1) (1976).

⁷The version of the statute in effect from 1975 until 1978 made it fairly clear that the legislature intended to establish a lesser category of abandonment. This intent is less clear under the 1978 amendments. The earlier version, IND. CODE § 31-3-1-6(g)(1) (1976) (amended 1978), provided:

Section 31-3-1-6(g)(1) permits a court to dispense with the consent of a non-custodial parent who has unjustifiably failed to "communicate significantly" with the child for one year, or has failed to support the child for one year, when able to do so.⁸ Either of those circumstances might be evidence of abandonment,⁹ but neither could suffice in itself to establish the all-encompassing intent to relinquish parental rights traditionally required for abandonment. It is undoubtedly necessary to broaden the courts' power to terminate inactive parent-child relationships so that the child will be able to make more lasting and productive ties with adoptive parents. This is especially true where, as the statute requires, the child has been in the actual custody of someone other than the parent for a period of one year or more. Abandonment is a concept derived from property law and should not be treated as controlling the disposition of children. Nevertheless, it would be well to keep in mind that the statute allows parents to be permanently severed from all connection with their children for conduct which, in some instances at

(g) *Consent to adoption is not required of:*

(1) a parent or parents if the child is adjudged to have been abandoned or deserted for six (6) months or more immediately preceding the date of the filing of the petition; or *a parent of a child in the custody of another person, if for a period of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so or he wilfully fails to provide for the care and support of the child when able to do so as required by law or judicial decree, or if the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents....*

(Emphasis added). Although this section is unclear, it can be read as authorizing a finding of abandonment if a parent fails to communicate with the child, *or if* he fails to support the child, *or if* he makes only token efforts to support or communicate. It can also be read as authorizing a finding of abandonment if the parent has made "only token efforts to support or to communicate," but *not if* the parent has *totally* failed to support the child or to communicate with it. This obviously makes little sense, yet the 1978 version appears to adopt this reading. The relevant portion of IND. CODE § 31-3-1-6(g)(1) (Supp. 1978) now reads:

(g) *Consent to adoption is not required of:*

(1) . . . a parent of a child in the custody of another person, *if for a period of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so or knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree (when the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents)....*

(Emphasis added).

⁸The statute might also be described as creating a conclusive presumption of abandonment, based on proof of either non-support or failure to communicate.

⁹But see *In re Adoption of Anonymous*, 158 Ind. App. 238, 302 N.E.2d 507 (1973).

least, may be unintentional, or at most negligent.¹⁰ The courts should be wary of allowing the standards of proof to become too lax.

Two cases dealt with the portion of section 6(g)(1) dispensing with the necessity for consent of "a parent of a child in the custody of another person, if for a period of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so."¹¹ In *Rosell v. Dausman*,¹² the father's second wife petitioned the court for adoption of his two sons. The first wife, the children's natural mother, refused to consent, but the trial court granted the stepmother's petition based upon its finding that the natural mother had unjustifiably failed to communicate significantly with the children for at least one year. The court of appeals affirmed.¹³

The mother in *Rosell* contended that the statutory one-year period of non-communication had to be the year immediately preceding the filing of the petition. Here, she had visited the children three times, seven or eight months before the petition was filed,¹⁴ but prior to these visits, there had been no communication at all for a period of more than eighteen months.¹⁵ The court of appeals rejected the mother's proposed interpretation of the statute, holding instead that proof of failure to communicate for *any* one-year period would be sufficient under the statute.¹⁶ Therefore, even assuming that the three visits within the year preceding the filing of the petition constituted the "significant" communication envisioned by the statute, the eighteen-month period of total non-communication preceding these visits satisfied the statutory requirements. Nothing in the statute required that the failure to communicate occur in the year immediately preceding the filing of the petition. To so interpret the statute would encourage non-custodial parents to visit their children just often enough to frustrate any attempted adoption.¹⁷

¹⁰The non-support ground did require *wilful* failure to support when able to do so, but the word "wilfully" was changed to "knowingly" in the 1978 amendments, which seems to decrease the quantum of intent required to prove this ground. IND. CODE § 31-3-1-6(g)(1) (Supp. 1978). See note 7 *supra*.

¹¹IND. CODE § 31-3-1-6(g)(1) (1976). *Rosell v. Dausman*, 373 N.E.2d 185 (Ind. Ct. App. 1978) dealt with the statute as it existed *prior to* the 1975 amendments. *In re Adoption of Dove*, 368 N.E.2d 6 (Ind. Ct. App. 1977) dealt with the statute *after* the 1975 amendments. The differences between the two versions of the statute were not significant to the issues involved in these cases.

¹²373 N.E.2d 185 (Ind. Ct. App. 1978).

¹³*Id.* The case was heard by the court of appeals en banc, and the opinion was written by Presiding Judge Staton.

¹⁴The visits occurred on August 28, 1974, September 8, 1974, and September 15, 1974. The stepmother's petition was filed April 21, 1975. *Id.* at 188.

¹⁵*Id.* at 187.

¹⁶*Id.* at 188.

¹⁷*Id.* The words of the statute support the court's interpretation. In order for the parent's consent to be dispensed with on the traditional ground of "abandonment or

The principal issue decided in *In re Adoption of Dove*¹⁸ concerned the applicability of certain provisions of section 31-3-1-7 of the adoption statutes,¹⁹ which was repealed in 1978. These aspects of the case have little current relevance. In *Dove*, the court of appeals affirmed the trial court's order granting the petition for adoption filed by the child's paternal grandparents. The trial court found that the mother had abandoned the child by unjustifiably failing to communicate with him for more than one year, and that her consent to the adoption was, therefore, unnecessary.²⁰

The value of *Young v. Young*²¹ as precedent is also questionable because of the 1978 amendments to the adoption statutes. *Young* held that the failure of a mother to make support payments ordered by the court in her divorce was not the *wilful* nonsupport required by section 6(g)(1)²² before the mother's consent to adoption could be dispensed with. The trial court, therefore, erred in granting the stepmother's petition to adopt the children, when the mother had refused to consent to the adoption.²³ In the 1978 amendments to section 6(g)(1), the word "wilfully" was changed to "knowingly."²⁴ Whether this difference in wording will change the result in factual situations similar to *Young* remains to be decided in future cases. It would have been difficult to argue, under the facts of *Young*, that the mother had not "knowingly" failed to make the support payments ordered by the divorce court, simply because no one had

desertion," the abandonment must be found to have taken place "for six (6) months or more *immediately preceding* the date of the filing of the petition." IND. CODE § 31-3-1-6(g)(1) (1976) (amended 1978) (emphasis added). For the statutory grounds (or lesser categories of abandonment), it is required only that the non-support or failure to communicate continue "for a period of at least one year." *Id.* (emphasis added). No particular one-year period is specified.

¹⁸368 N.E.2d 6 (Ind. Ct. App. 1977).

¹⁹IND. CODE § 31-3-1-7 (1976) (repealed effective October 1, 1979). Act of Mar. 10, 1978, Pub. L. No. 136, §§ 57, 59, 1978 Ind. Acts 1196, 1286-87.

²⁰368 N.E.2d at 8. The grandparents had taken custody of the child in 1969, at the mother's request, when she had "personal, emotional and economic problems" following her divorce from the child's father. *Id.* at 7-8. Although the evidence on communication was in conflict, the grandparents testified there was no communication between the mother and her son from November 1974 to June 1976, when they filed their adoption petition. *Id.* at 8.

²¹366 N.E.2d 216 (Ind. Ct. App. 1977).

²²IND. CODE § 31-3-1-6(g)(1) (1976). The provision is reproduced in note 7 *supra*.

²³366 N.E.2d at 216, 217. The children had been living with the father and stepmother although the divorce decree had awarded custody to the paternal grandmother. Both parents had been ordered to make weekly support payments to the grandmother. Although it was undisputed that the mother had never made the payments ordered, there was no evidence that anyone had ever asked for them. The court of appeals, therefore, held that the mother's failure to support her children was not "wilful." *Id.*

²⁴IND. CODE § 31-3-1-6(g)(1) (Supp. 1978). See note 7 *supra*.

ever requested that she make them, so the result might well have been different under the amended statute.

2. *Termination of Parental Rights.*—The legislature has made substantial changes in the procedures for terminating parental rights. Beginning October 1, 1979, when the newly enacted juvenile code becomes effective, juvenile courts will handle both voluntary and involuntary termination proceedings.²⁵ Although the juvenile courts have been ordering involuntary termination of parental rights under the present statutes, the statutory authority for such proceedings is less than clear.²⁶ The only provision expressly authorizing proceedings for permanent involuntary termination of parental rights is in section 7 of the adoption statutes,²⁷ which applies only to adoption proceedings and not to juvenile proceedings. Section 7 has now been repealed, effective October 1, 1979,²⁸ when the new juvenile code becomes effective. After that date, the only power courts handling adoptions will have over termination of parental rights will be that given by section 6(g) of the adoption statutes,²⁹ which specifies the grounds on which a court can dispense with a parent's consent to the adoption of his or her child.³⁰ Any separate proceedings for termination of parental rights, not brought in connection with an adoption, apparently, will have to be brought in juvenile court after October 1, 1979.

B. Child Abuse

The new child abuse statute becomes effective January 1, 1979.³¹ It broadens the definition of abused children to include victims of sex offenses as well as victims of physical injury.³² The duty to report child abuse is expanded to include a duty to report child *neglect* as well. Now "any individual who has reason to believe that a child is the victim of child abuse or neglect" is required to make

²⁵IND. CODE §§ 31-6-5-1 to 6 (Supp. 1978).

²⁶See *In re Perkins*, 352 N.E.2d 502 (Ind. Ct. App. 1976); Garfield, *Domestic Relations, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 149, 149-53 (1978). *Perkins* held that the juvenile courts did have jurisdiction to order permanent involuntary termination of parental rights, despite the ambiguity of the statutes. 352 N.E.2d at 505-06 (citing *In re Collar*, 155 Ind. App. 668, 294 N.E.2d 179 (1973)).

²⁷IND. CODE § 31-3-1-7 (1976).

²⁸Act of Mar. 10, 1978, Pub. L. No. 136, §§ 57, 59, 1978 Ind. Acts 1196, 1286-87.

²⁹IND. CODE § 31-3-1-6(g) (Supp. 1978).

³⁰There has been some modification of § 6(g), to conform it to the changes in termination procedure under the new juvenile code. Subsections (7) and (8) have been deleted and subsection (4) has been modified. IND. CODE § 31-3-1-6(g)(1) (Supp. 1978).

³¹IND. CODE §§ 31-5.5-1-1 to 3-20 (Supp. 1978). The present statute, Ind. Code §§ 12-3-4.1-1 to 6 (1976), has been repealed, effective January 1, 1979, by Act of Mar. 10, 1978, Pub. L. No. 135, § 4, 1978 Ind. Acts 1181, 1196.

³²*Id.* § 31-5.5-1-1 (Supp. 1978).

an oral report to the "child protection service" established by the statute, or to a law enforcement agency.³³ Failure to report is a class B misdemeanor.³⁴ The person making such a report is granted immunity from civil or criminal liability, unless he acted maliciously or in bad faith.³⁵ In every child abuse case, an investigation must be initiated by the child protection service within twenty-four hours of the time a report is received.³⁶ All reports and information obtained in the course of an investigation are to remain confidential.³⁷ Appropriate "social services" are to be offered to the child and its family, or they may be ordered by the juvenile court;³⁸ where good cause is shown, the court can order temporary removal of the child from the family.³⁹ The statute sets up machinery for investigating child abuse and neglect, and for providing protective and rehabilitative services to the child and its family. Whether the machinery proves to be effective will depend upon how well it is funded and implemented.⁴⁰

C. Child Custody and Support

1. *Parental Rights Presumption.*—In a custody dispute between a parent and a non-parent, it is presumed that the best interests of the child will be served by awarding custody of the child to the parent.⁴¹ In two cases decided during the survey period, the court of appeals was called upon to determine whether the same presumption would apply in favor of an adoptive parent⁴² or the father of an illegitimate child.⁴³ In both cases, the answer was in the affirmative.

In *Stevenson v. Stevenson*,⁴⁴ the adoptive mother, the child's maternal grandmother, sought custody of the child in her divorce

³³*Id.* §§ 31-5.5-3-3, 4. Establishment of child protective services within each county department of public welfare is required by *id.* § 31-5.5-3-10.

³⁴*Id.* § 31-5.5-3-3(a).

³⁵*Id.* § 31-5.5-3-7. Immunity is also provided in the repealed statute. *Id.* § 12-3-4.1-4 (1976) (repealed 1978).

³⁶*Id.* § 31-5.5-3-11(b) (Supp. 1978).

³⁷*Id.* § 31-5.5-3-18.

³⁸*Id.* § 31-5.5-3-11(f) to (i).

³⁹*Id.* § 31-5.5-3-11(e).

⁴⁰For a discussion of some of the problems encountered when the law attempts to deal with the social problem of child abuse, see Dickens, *Legal Responses to Child Abuse*, 12 FAM. L.Q. 1 (1978).

⁴¹Hendrickson v. Binkley, 161 Ind. App. 388, 393, 316 N.E.2d 376, 380 (1974), *cert. denied*, 423 U.S. 868 (1975).

⁴²Stevenson v. Stevenson, 364 N.E.2d 161 (Ind. Ct. App. 1977).

⁴³Hyatte v. Lopez, 366 N.E.2d 676 (Ind. Ct. App. 1977).

⁴⁴364 N.E.2d 161 (Ind. Ct. App. 1977).

proceedings. The adoptive father, the child's grandfather, also sought custody. The adoptive parents' son and daughter-in-law, the child's uncle and aunt, intervened, asking that custody be awarded to them. The trial court awarded custody to the intervenors, and the court of appeals affirmed.⁴⁵ The court of appeals held that the parental preference presumptions *did* apply in favor of the adoptive mother, but that the presumption had been rebutted.⁴⁶ The evidence indicated that the adoption by the grandparents was effected after the child's mother learned she had a brain tumor, and that its purpose was to prevent the child's father from obtaining custody when the mother died. The child continued to live with the mother after the adoption, until the mother's death in 1975. The child apparently never lived with the adoptive parents or adopted their surname.⁴⁷ The court of appeals held the evidence sufficient to support a finding that the grandmother either acquiesced in allowing the child's custody to remain with another (the mother), or that she voluntarily relinquished custody to another. Either finding would be sufficient to rebut the presumption in favor of the adoptive mother, without a finding that she was "unfit" for custody.⁴⁸

In *Hyatte v. Lopez*,⁴⁹ the court of appeals affirmed the trial court's award of custody to the father of an illegitimate child, over the objections of the maternal grandparents. The court held that the parental preference presumption operated in favor of the natural father, and that the trial court's implicit finding that the presumption had not been rebutted, based on conflicting evidence, was not an abuse of discretion.⁵⁰ Here, the child had been living with the grandparents since 1974, but the father had made repeated attempts

⁴⁵*Id.* at 163.

⁴⁶*Id.* at 165.

⁴⁷*Id.* at 163. The child's surname was not changed in the adoption proceedings. In 1974, it was changed to "Ghuman," her stepfather's name. The *Stevenson* opinion does not indicate where the child lived after her mother died in 1975 (nearly eight months elapsed between the mother's death and the trial court's award of custody to the child's uncle and aunt). *Id.*

⁴⁸*Id.* at 165. The court held the presumption could be rebutted by a third party seeking custody, even though the third party was *not* the party to whom custody had been relinquished. *Id.* The court determined that the parental preference presumption can be rebutted by proof of (1) unfitness of the parent, (2) long acquiescence to custody in another, or (3) voluntary relinquishment of custody to a third party "such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child." *Id.* (citing *Hendrickson v. Binkley*, 161 Ind. App. at 393, 316 N.E.2d at 380). There would seem to be little substantive difference between "long acquiescence" and "voluntary relinquishment," acquiescence being merely a passive form of relinquishment. Relinquishment by inaction (acquiescence) would nonetheless be "voluntary."

⁴⁹366 N.E.2d 676 (Ind. Ct. App. 1977).

⁵⁰*Id.* at 681.

to regain custody. Hence, there was no acquiescence or voluntary relinquishment by the father, and there was no finding that he was unfit for custody.⁵¹

2. *Visitation Rights.*—Section 31-1-11.5-24(b) provides that a court “shall not *restrict* a parent’s visitation rights unless it finds that the visitation might endanger the child’s physical health or significantly impair his emotional development.”⁵² Because the courts are authorized to *modify* visitation rights whenever the “best interests of the child” require it,⁵³ the question arises: When does a *modification* of visitation rights constitute a *restriction*, which can be justified only by danger to the child’s physical or emotional health? The answer given by the Indiana Court of Appeals in *Milligan v. Milligan*⁵⁴ seems to be “almost always.”

In *Milligan*, the original dissolution decree gave the father the right to one overnight visitation per month, two hours per week of visitation in the mother’s home, and all-day visitation outside her home on alternate holidays.⁵⁵ The trial court later found both parties in contempt for violations of the existing decree, then entered its order modifying visitation to allow the father only daytime visitation, one day per month.⁵⁶ The court of appeals held that this constituted a “restriction” of the father’s visitation rights, which required a finding under section 24(b) that “the visitation might endanger the child’s physical health or significantly impair his emotional development.”⁵⁷ Since no such finding was made, the order was reversed.⁵⁸

In his concurring opinion, Judge Garrard agreed that the majority’s interpretation was required by the words of section 24(b). However, he felt the legislature’s attention should be drawn to the possibly unintended effects of the language of the statute. Modifica-

⁵¹The court of appeals held that the evidence would not support a ruling that the father was unfit as a matter of law. *Id.* at 679. The father had lived with the child’s mother for 10 or 11 years, before and after the child’s birth. The mother had left the child with the grandparents (*her* mother and stepfather) in 1974 when she entered the hospital for the birth of a second child. Thereafter, she disappeared. The grandparents retained custody of the child and the father filed a petition for a writ of habeas corpus to regain custody. *Id.* at 678.

⁵²IND. CODE § 31-1-11.5-24(b) (1976) (emphasis added).

⁵³*Id.*

⁵⁴365 N.E.2d 1244 (Ind. Ct. App. 1977).

⁵⁵The decree incorporated a settlement agreement between the parties. A prior modification, also by agreement of the parties, had made “minor changes” in the original order. *Id.* at 1246.

⁵⁶The modification order allowed the father visitation “on the first Sunday of every month from 8:00 a.m. until 8:00 p.m.” 365 N.E.2d at 1245.

⁵⁷*Id.* at 1246. (quoting IND. CODE § 31-1-11.5-24(b) (1976)).

⁵⁸365 N.E.2d at 1246.

tion orders are usually entered to redefine visitation rights after more general and flexible orders have proved unworkable in practice. Such orders would invariably constitute "restrictions" on visitation rights under the literal words of section 24(b). So, although the best interests of the child might clearly require modification, a court would be powerless to order it unless the court could find that the child's physical or emotional health was endangered. Judge Garrard did not believe that the legislature intended this result.⁵⁹

In *McCurdy v. McCurdy*,⁶⁰ the trial court had made a finding that the children's physical or emotional health would be endangered if it granted the father's request to have the children visit him in prison.⁶¹ The father had been sentenced to the Indiana State Prison on his plea of guilty to one count of kidnapping and four counts of rape. The court of appeals held that the trial court had abused its discretion, and directed it to "compel" the mother to allow the children to "occasionally visit" the father in prison.⁶² Judge Hoffman dissented on the ground that there was ample evidence in

⁵⁹*Id.* at 1246-47 (Garrard, J., concurring). The opinion stated:

The common, and perhaps the best, practice adopted by many courts . . . is simply to award to the non-custodial parent the right of visitation at all reasonable times and places. The flexibility allowed thereby promotes a continued spirit of cooperation between the parents and may aid the child in its right to a meaningful relationship with both mother and father. Of course, such orders do not always operate as intended. . . .

In such instances, upon application of one of the parties, the common practice of our courts is to specify times for visitation. In other cases parties relocate their homes in other communities with the result that to remain "reasonable" a prior visitation order should be modified. *I do not believe it to have been the legislative intent to require that in all such instances . . . the court should be required to find that unless the order is made the child's physical health will be endangered or its emotional development will be significantly impaired.*

Id. (emphasis added).

⁶⁰363 N.E.2d 1298 (Ind. Ct. App. 1977).

⁶¹*Id.* at 1302. Since no restriction on the father's previously granted rights to "reasonable visitation" was involved, the finding here was made under IND. CODE § 31-1-11.5-24(a) (1976) which provides: "A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the parent might endanger the child's physical health or significantly impair his emotional development." Although the father here *had* been granted visitation rights, he would be unable to exercise them unless the court ordered the wife to allow the children to visit him in prison.

⁶²363 N.E.2d at 1300-01. The majority felt it would be better for the children to "learn the truth about their father now" and that their visits might have a "rehabilitative effect" on the father. *Id.* at 1301. It may indeed have been better for the children to know the truth, but this does little to prove that they should be ordered to visit their father in prison. Any rehabilitative effect on the father is highly speculative.

the record to support the trial court's finding and order.⁶³ It does indeed seem that the court of appeals has exalted the parent's right to visitation above the welfare of his children in holding that an incarcerated father is entitled as a matter of law to visitation from his young children⁶⁴ despite the trial court's finding that such visitation might endanger the children's physical health or significantly impair their emotional development.

3. *Child Support*.—The Dissolution of Marriage Act no longer places the primary burden for supporting a child on the father. Either or both parents can be ordered to pay reasonable child support, taking into account the financial resources of both parents and the needs of the child.⁶⁵ The court also can order either parent to provide for the child's college education, or for medical expenses.⁶⁶

*In re Marriage of Osborne*⁶⁷ involved a dissolution of marriage decree in which the father was ordered to pay all of his daughter's

⁶³*Id.* at 1302 (Hoffman, J., dissenting). Judge Hoffman described the evidence as follows:

Testimony of two witnesses at the hearing described the reaction of Tamela to her father's arrest and incarceration in the county jail. "And she withdrew. (sic) She cried an awful lot; she just didn't seem happy with anything. She didn't want to be with the other children, she didn't want to be with people; she more or less wanted to be off to herself. And when it would get dark, she wanted to make sure she was by her mother." It took about six months for Tamela to return to her cheerful self as a happy and content child, who likes to be with other children and have a good time.

Id.

⁶⁴The children were four and seven years old at the time the original dissolution decree was entered in June 1975. *Id.* at 1299. The youngest child was six years old when the decision on appeal was issued June 28, 1977.

⁶⁵IND. CODE § 31-1-11.5-12(a) (1976) provides:

Sec. 12. Child Support. (a) In an action pursuant to section 3(a) or (b), the court may order either parent or both parents to pay any amount reasonable for support of a child, without regard to marital misconduct after considering all relevant factors including:

- (1) the financial resources of the custodial parent;
- (2) standard of living the child would have enjoyed had the marriage not been dissolved;
- (3) physical or mental condition of the child and his education needs; and
- (4) financial resources and needs of the noncustodial parent.

⁶⁶IND. CODE § 31-1-11.5-12(b) (1976) provides:

- (b) Such child support order may also include, where appropriate:
 - (1) sums for the child's education in schools and at institutions of higher learning, taking into account the child's attitude and ability and the ability of the parent or parents to meet these expenses; and
 - (2) special medical, hospital or dental expenses necessary to serve the best interests of the child.

⁶⁷369 N.E.2d 653 (Ind. Ct. App. 1977). The principal issue in the case concerned the property division provisions of the decree. It is discussed at notes 173-76 *infra* and accompanying text.

college expenses, including tuition, books, room and board and an allowance of \$15 per week. When the daughter was not in college, the father was to pay \$50 per week and all medical expenses in excess of \$100 per year. At the time of the dissolution, the wife's earnings were slightly higher than the husband's. The court of appeals reversed, holding that the trial court had failed to give sufficient consideration to the wife's earnings and to her duty of support: "It appears instead that the order was premised upon the assumption that it was the father's preliminary obligation to support his child regardless of the economic circumstances of the parties."⁶⁸ The trial court had apparently disregarded the standards set forth in the statute and made a determination improperly based upon the sex of the parent.⁶⁹ The court of appeals was perhaps too ready to assume that, by paying all of his daughter's college expenses, the father would be meeting all of the daughter's support needs. It is apparent to any parent of a child in college that there are additional expenses not covered by the court order, for instance, clothing and transportation. It will also continue to be necessary for the mother to maintain a home for the daughter, although it may be used only during vacation periods. Even if these expenses are taken into account, however, the trial court's order still seems to impose too large a share of the burden of support on the father.

The criminal non-support statute has long been sex-neutral, at least as far as non-support of *children* was concerned.⁷⁰ The former statute applied to "every person having any child under the age of eighteen (18) years depending upon him or her for education or support, who *wilfully neglects* to furnish necessary food, clothing, shelter and medical attention . . .".⁷¹ Under the present statute, it is a Class D felony for "a person [to] knowingly or intentionally [fail] to provide support to his dependent child."⁷² It is debatable whether the changes in the wording of the statute will alter the result in cases such as *Hudson v. State*,⁷³ decided under the former statute.

⁶⁸*Id.* at 658. The court rejected any contrary implication in the dictum in *Geberin v. Geberin*, 360 N.E.2d 41, 46 (Ind. Ct. App. 1977), that "it is not an abuse of discretion for the trial court to ignore the mother's financial means." In *Geberin*, the husband's earnings were more than triple those of the wife.

⁶⁹369 N.E.2d at 658.

⁷⁰IND. CODE § 35-14-4-1 (1976) (repealed effective 1977). With regard to support of spouses, only the husband was liable for criminal nonsupport. *Id.*

⁷¹*Id.* (emphasis added). Criminal nonsupport was a misdemeanor, punishable by a fine of not more than \$500 and imprisonment in the county jail for a period not exceeding six months. *Id.*

⁷²*Id.* § 35-46-1-5 (Supp. 1978) (emphasis added). Inability of a parent to provide support is a defense to the charge. *Id.*

⁷³370 N.E.2d 983 (Ind. Ct. App. 1977).

In *Hudson*, the court of appeals upheld the conviction of an able-bodied unemployed father, who had made no support payments under a dissolution decree. The court held that the evidence was sufficient to support a jury finding that he was "deliberately pursuing an irresponsible lifestyle, that he intentionally failed to conscientiously seek employment, and that he wilfully neglected to provide support for his children."⁷⁴ It is at least arguable that the same evidence would also support a finding under the current statute that the father "knowingly or intentionally" failed to support his children.

In *Strawser v. Strawser*,⁷⁵ the husband had obtained an ex parte divorce which made no provision for the custody or support of the parties' three sons. The children continued to live with their mother in Florida, and in 1973 all three children were emancipated. In January, 1976, the mother sued the father for reimbursement of sums allegedly spent on support of the children prior to their emancipation. The trial court's judgment in her favor for \$13,649 was reversed by the court of appeals, which held her action was barred by the two-year statute of limitations for "injuries to personal property."⁷⁶ The court's "reasoning" was: The nature of the mother's action is "in effect an allegation of a debt,"⁷⁷ hence, it is an action "at law" and the statute of limitations—rather than the equitable doctrine of laches—applies; the right to a debt is a chose in action, which is also a property right; choses in action are properly characterized as personality; therefore, the statute of limitations for "injuries to personal property" applies.⁷⁸

If the court of appeals was correct in its initial determination that the *Strawser* action was "in effect an allegation of a debt," then the court should have applied the statute of limitations for debt,⁷⁹ instead of following this circuitous line of reasoning to the astonishing conclusion that what had started as an action for "debt" should be treated as an action for "injuries to personal property" for statute

⁷⁴*Id.* at 985.

⁷⁵364 N.E.2d 791 (Ind. Ct. App. 1977).

⁷⁶*Id.* at 792. The statute applied was IND. CODE § 34-1-2-2 (1976).

⁷⁷364 N.E.2d at 792.

⁷⁸*Id.* at 792.

⁷⁹It is not clear which statute of limitations would apply, since the Indiana statutes speak of debt only in terms of contractual obligations, whereas the father's obligation in *Strawser* was based upon his legal duty to support his children. The analogy to a contractual obligation, however, is certainly much closer than the analogy to an action for "injuries to personal property." If the obligation were analogized to a debt, the appropriate statute would be either IND. CODE § 34-1-2-1(1) (1976) (6 years for a contract not in writing), or *id.* § 34-1-2-2(5) (1976) (10 years on a written contract). Either would seem more appropriate than the two-year statute for injuries to personal property. *Id.* § 34-1-2-2(1) (1976).

of limitations purposes. The characterization of this action as debt is also open to serious question. The court of appeals relied upon *Owens v. Owens*⁸⁰ and *Corbridge v. Corbridge*,⁸¹ both of which refer to past-due installments of court-ordered support as "debt"; but these cases are not apposite here, because no decree was ever entered fixing the amount of support due from the father.⁸² The initial determination by a court, fixing a reasonable amount due from the father for support of his children, is equitable in nature.⁸³ No such determination had ever been made in *Strawser*, and this was essentially what the mother was entitled to in her reimbursement action. Although she sued to recover a specific sum of money spent on support of the children, she was not ipso facto entitled to reimbursement. When the trial court awarded her judgment for these sums, it implicitly found that the sums expended by the wife were reasonable and necessary to the support of the children, and that the husband should equitably be required to reimburse her.⁸⁴ Although the form of the action may have resembled an action "at law," on a "debt," in substance it was an action in equity to enforce the legal duty of a parent to support his children. It is, thus, doubly ironic that such an action should be held to be barred by a two-year statute of limitations for injuries to personal property.

⁸⁰354 N.E.2d 350 (Ind. Ct. App. 1976).

⁸¹230 Ind. 201, 102 N.E.2d 764 (1952).

⁸²If there *had* been an order of support entered in *Strawser*, the ten-year statute of limitations relating to judgments, IND. CODE § 34-1-2-2(6) (1976), should apply, despite any inference to the contrary which might be drawn from the language of *Owens*. For a more complete discussion of *Owens*, see Garfield, *supra* note 26, at 173-75; Townsend, *Secured Transactions and Creditors' Rights*, 1977 *Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 281-82 (1978).

Merritt v. Economy Dept. Store, 125 Ind. App. 560, 128 N.E.2d 279 (1955), cited in *Strawser v. Strawser*, 364 N.E.2d at 792, 793, also has no relevance to the issue presented. Although characterized in the *Strawser* opinion as involving the husband's "right to reimbursement" for his wife's medical expenses, 364 N.E.2d at 793, *Merritt* was a suit by the husband for damages resulting from personal injuries inflicted on his wife through defendant's negligence. One of the items of damage alleged was the medical expenses, but it was the husband's claim for loss of services which led the court to classify the action, for statute of limitations purposes, as one for injuries to personal property. 128 N.E.2d at 280-81. No such claim was involved in *Strawser*.

⁸³Although actions for child support are authorized by statute, IND. CODE § 31-1-11.5-3(b) (1976), it has long been recognized in Indiana that courts of general equity jurisdiction have the power to order parents to support their children independent of statutes. *Leibold v. Leibold*, 158 Ind. 60, 62 N.E. 627 (1902). See generally, H. CLARK, LAW OF DOMESTIC RELATIONS § 15.1 (1968).

⁸⁴See H. CLARK, *supra* note 83, § 15.1: "The only issue [in a dispute over reimbursement of past support expenses] is, as between husband and wife, who should *equitably* bear the expense." (Emphasis added.) If the action is characterized as equitable, then the equitable doctrine of laches, rather than the statutes of limitations, should apply.

D. Dissolution of Marriage

1. *Jurisdiction.*—Dissolution of marriage has always been regarded as the province of state, rather than federal, government.⁸⁵ Problems arise, however, when two or more states become concerned with the dissolution of a single marriage. Each state is required by the United States Constitution to give "full faith and credit" to the judicial proceedings of every other state.⁸⁶ Whether in a given instance one state must defer to the decree of another state in an action affecting marital status ultimately depends on the jurisdiction each state has over the various aspects of the marriage relation. Since it is increasingly likely, in a highly mobile society, that more than one state will have a legitimate claim to jurisdiction over a single marriage, complex problems of jurisdiction and full faith and credit arise. These problems were explored in two opinions issued by the Indiana Court of Appeals during the survey period, *In re Marriage of Rinderknecht*⁸⁷ and *Abney v. Abney*.⁸⁸

In *Rinderknecht*, both Nebraska and Indiana had issued decrees affecting the marriage of a serviceman stationed in Omaha, but domiciled in Indiana. The wife had filed an action for separate maintenance in Nebraska four days before the husband petitioned for dissolution of the marriage in Indiana.⁸⁹ Subsequently, each court issued a decree. The Indiana decree dissolved the marriage; the Nebraska separate maintenance decree did not purport to affect the parties' marital status. Both decrees awarded the wife custody of the parties' only child, which, apparently, was not in dispute, but each decree awarded the wife a different amount as child support.⁹⁰ The decrees also awarded the respective parties different automobiles.⁹¹

Since the two decrees were inconsistent with each other, it became necessary for the Indiana Court of Appeals to resolve the conflict. The court held that the Indiana trial court had jurisdiction

⁸⁵See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (citing *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859)).

⁸⁶U.S. CONST. Art. IV, § 1, provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

⁸⁷367 N.E.2d 1128 (Ind. Ct. App. 1977).

⁸⁸374 N.E.2d 264 (Ind. Ct. App. 1978).

⁸⁹The husband was personally served with summons in Nebraska. The wife was served by certified mail in the husband's Indiana action.

⁹⁰The Nebraska decree ordered the husband to pay \$65 every two weeks as child support. The Indiana decree ordered him to pay \$25 per week, and to provide for the medical and insurance needs of the child.

⁹¹The Nebraska decree awarded the wife possession of a 1975 Matador automobile, title to which was in the husband's name alone. The Indiana decree awarded this automobile to the husband, giving the wife a 1968 automobile (also held in the husband's name).

over the marital status, based upon its determination that the husband was a domiciliary of Indiana.⁹² Domicile is the key to a court's jurisdiction over marital status. A state where *either* of the parties is domiciled has jurisdiction to dissolve the marriage, even without personal jurisdiction over the other party.⁹³ Jurisdiction in divorce is divisible, however. Jurisdiction over custody, support and property rights *does* require personal jurisdiction over both parties,⁹⁴ and the Indiana court did not have personal jurisdiction over the wife. The court of appeals rejected the husband's contention that his wife and child were also domiciled in Indiana, recognizing the "modern trend" which allows a wife the right to choose her own domicile, separate from the husband's.⁹⁵ The domicile of the wife was held to be Nebraska and the domicile of the child was the same as that of the mother with whom she lived.⁹⁶ In view of this, the Indiana court could not claim personal jurisdiction over the wife based upon service outside the state by certified mail.⁹⁷ The Indiana decree was, therefore, held to be effective to dissolve the marriage, but not to affect custody or property rights of the nonresident wife.⁹⁸ The conflicts in the support and property provisions were thus resolved in favor of the Nebraska decree.

The *Rinderknecht* opinion discusses the effect of *Shaffer v. Heitner*⁹⁹ on jurisdiction problems in dissolution of marriage actions. The United States Supreme Court held in *Shaffer* that *all* assertions of state court jurisdiction must meet the "minimum contacts" due process standard of *International Shoe Co. v. Washington*,¹⁰⁰

⁹²The court of appeals upheld the trial court's finding of domicile although the husband had not lived in the state since his enlistment from Indiana in 1968. 367 N.E.2d at 1132. Once domicile is established, it is not lost by absence from the state, as long as the party intends to return. H. CLARK, *supra* note 83, § 4.2.

The husband's status as a domiciliary satisfied the requirement of the Indiana statute that "at least one of the parties shall have been a resident of the state" for six months immediately preceding the filing of a petition for dissolution of marriage, IND. CODE § 31-1-11.5-6 (1976), "resident" under the statute being construed to mean "domiciliary." 367 N.E.2d at 1131 (citing *Board of Medical Registration v. Turner*, 241 Ind. 73, 168 N.E.2d 193 (1960)).

⁹³Williams v. North Carolina, 317 U.S. 287 (1942).

⁹⁴Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); May v. Anderson, 345 U.S. 528 (1953); Estin v. Estin, 334 U.S. 541 (1948).

⁹⁵367 N.E.2d at 1132 (citing H. CLARK, *supra* note 83, § 4.3).

⁹⁶367 N.E.2d at 1132. "[T]he residence or domicile of the child would follow the residence of the parent with whom the child is living." *Id.*

⁹⁷Under *Milliken v. Meyer*, 311 U.S. 457 (1940), such service would apparently be sufficient to confer personal jurisdiction over a *domiciliary* of the state, provided there was actual notice, as there evidently was in *Rinderknecht*.

⁹⁸367 N.E.2d at 1136, 1137.

⁹⁹433 U.S. 186 (1977).

¹⁰⁰326 U.S. 310 (1945), *cited with approval in Shaffer*, 433 U.S. at 212.

whether the jurisdiction asserted is in rem or in personam. Dissolution of marriage involves both types of jurisdiction. Insofar as it affects the parties' marital status, dissolution has generally been treated as a proceeding in rem; adjudication of the parties' rights to custody, support and property has been treated as in personam.¹⁰¹ As to the in rem (status) aspects of divorce, the court of appeals held only that the minimum contacts test was satisfied "by requiring only the residency of one of the parties."¹⁰² Assuming that the court used "residency" to mean "domicile," this is an accurate statement of the rule of *Williams v. North Carolina*,¹⁰³ which appears to be in no imminent danger of being overruled.¹⁰⁴ It is conceivable, however, that application of the *Shaffer* "minimum contacts" test could lead the Supreme Court to modify the *Williams* rule to the extent that it might be used to confer divorce jurisdiction on a state which is merely the technical domicile of one of the parties, but has no real contact with either party, or with the marriage. But *Rinderknecht* is not such a case. Although Indiana had no real contact with the wife or with the marriage, its contact with the husband appeared to be substantial enough to justify the Indiana courts in assuming jurisdiction over his marital status. Since the wife was protected by the requirement that a court must have personal jurisdiction over her before it can adjudicate her custody or property rights, it seems doubtful that her due process rights were violated by allowing Indiana to dissolve the marriage.

As far as the in personam aspects of jurisdiction are concerned, there was no real need for the court of appeals to discuss the implications of *Shaffer*. Because the court held that there was no valid basis for the trial court to assert jurisdiction, either under Trial Rule 4.4¹⁰⁵ or on a theory of waiver by the wife,¹⁰⁶ there was no need

¹⁰¹367 N.E.2d at 1133. The Supreme Court has been equivocal about attaching these jurisdictional labels, see *Williams v. North Carolina*, 317 U.S. 287, 297 (1942), but its treatment of jurisdictional issues in divorce, especially the different requirements for jurisdiction over the status and over the other incidents of marriage, is entirely consistent with the in rem-in personam analysis.

¹⁰²367 N.E.2d at 1134.

¹⁰³317 U.S. 287 (1942).

¹⁰⁴See *Sosna v. Iowa*, 419 U.S. 393, 407 (1975).

¹⁰⁵IND. R. TR. P. 4.4(A)(7) provides for jurisdiction over a nonresident "living in the marital relationship within the state notwithstanding subsequent departure from the state . . ." There was no evidence that the Rinderknechts had ever lived in Indiana as husband and wife. They had married in Idaho after the husband, an Indiana citizen, had enlisted in the Air Force. At the time the two actions were filed, both parties apparently were living in Nebraska.

¹⁰⁶The court of appeals held that the wife had not waived her objection to the trial court's jurisdiction by making what was, in effect, a special appearance, noting that special appearances are no longer necessary. If a defendant makes a timely challenge

to further test the claim of *in personam* jurisdiction under the constitutional "minimum contacts" standard. Only where the trial court did have a valid claim to *in personam* jurisdiction, under the long arm provisions of Trial Rule 4.4 or otherwise, would *Shaffer* require that such claimed jurisdiction also meet the minimum contacts test. If it failed to meet the test, there would be no valid personal jurisdiction, despite the long arm provision, because such jurisdiction would violate the wife's due process rights under the fourteenth amendment.¹⁰⁷

In *Abney v. Abney*,¹⁰⁸ the wife had obtained a separate maintenance decree in Tennessee in 1964. The husband thereafter attempted unsuccessfully to obtain a divorce in Tennessee. In 1970, the Tennessee Court of Appeals held his petition for divorce barred by his unpurged contempt for failure to pay arrearages in support under the separate maintenance decree.¹⁰⁹ The husband then filed a petition for dissolution of marriage in Marion County, Indiana. When the Indiana court refused the wife's request that it defer to the Tennessee court because of the prior litigation in that state, the wife obtained a Tennessee decree restraining the husband from pursuing his Indiana dissolution action.¹¹⁰ The Indiana court, nevertheless, entered a decree dissolving the marriage, and the court of appeals affirmed.¹¹¹

The wife argued that the trial court was bound to give effect to the Tennessee injunction, either under the full faith and credit clause of the United States Constitution¹¹² or as a matter of comity.

to the court's *in personam* jurisdiction, either by motion to dismiss or by answer, the issue may properly be raised on appeal even if the case proceeded to trial on the merits. *Id.* at 1136, n.11.

¹⁰⁷U.S. CONST. amend. XIV, § 1. See *Kulko v. Superior Court*, 98 S. Ct. 1690 (1978) (holding that the California courts could not assert long-arm personal jurisdiction over a nonresident father in an action for support of a child domiciled in California).

¹⁰⁸374 N.E.2d 264 (Ind. Ct. App. 1978).

¹⁰⁹*Abney v. Abney*, 61 Tenn. App. 531, 456 S.W.2d 364 (1970), cited in *Abney v. Abney*, 374 N.E.2d at 266.

¹¹⁰The Tennessee decree asserted that "this court [has] continuing jurisdiction over this Defendant through a separate maintenance decree . . . [and] refused this Defendant such relief previously requested . . . because of his being in contempt, and this contempt having never been purged." 374 N.E.2d at 266. The Tennessee decree restrained the husband from obtaining a dissolution of the marriage in any other jurisdiction.

¹¹¹*Id.* at 271. The court of appeals had initially sought to avoid a decision on the merits, affirming the trial court's decree because the wife's brief did not contain a verbatim statement of the dissolution decree as required by IND. R. APP. P. 8.3(A)(4). *Abney v. Abney*, 360 N.E.2d 1044 (Ind. Ct. App. 1977). The Indiana Supreme Court remanded the case for review on the merits, holding that the omission was cured by the verbatim statement contained in the husband's brief. *Abney v. Abney*, 374 N.E.2d 264, 265 (Ind. Ct. App. 1978).

¹¹²U.S. CONST. art. IV, § 1.

In a well-reasoned opinion, the court of appeals first noted the general agreement among the authorities that no court is obligated to give full faith and credit to an injunction issued in a sister state against the prosecution of judicial proceedings in the forum state.¹¹³ The jurisdiction of the Indiana court over the parties' marital status derived from the bona fide residence (domicile) of the husband in the state.¹¹⁴ Once that jurisdiction attached, it could not be ousted by the action of the Tennessee court in issuing an injunction against further prosecution of the suit by the husband. If any effect was to be accorded to the Tennessee injunction, it would have to be under the discretionary doctrine of comity, rather than under the constitutional compulsion of the full faith and credit clause.¹¹⁵

The wife's comity argument was based upon the premise that the Tennessee court retained "continuing jurisdiction over the marital relationship" under its 1964 separate maintenance decree.¹¹⁶ Such jurisdiction, however, extended only to modification of the support obligations imposed by that decree, and not to the parties' marital status.¹¹⁷ The Tennessee court had expressly declined to assert jurisdiction over the parties' marital status by dismissing the husband's petition for divorce.¹¹⁸ Indiana was, therefore, the first state to obtain jurisdiction over the marital status and was not required to defer to the later Tennessee injunction. Although priority of jurisdiction might not be the controlling factor in every case, it was considered dispositive here.¹¹⁹ The court of appeals held that the trial court had given Tennessee all the deference required when it

¹¹³374 N.E.2d at 267-68.

¹¹⁴See *Williams v. North Carolina*, 317 U.S. 287 (1942). See discussion of the similar jurisdictional issues raised by *Rinderknecht*, *supra* at notes 89-107 and accompanying text. No question was raised in *Abney* as to the bona fides of the husband's Indiana domicile. 374 N.E.2d at 269.

¹¹⁵374 N.E.2d at 267.

¹¹⁶*Id.* at 268.

¹¹⁷*Id.* The divisible nature of divorce jurisdiction was also involved in *Rinderknecht*.

¹¹⁸The Tennessee court's order is quoted at note 110 *supra*.

¹¹⁹374 N.E.2d at 268, 269. The court of appeals acknowledged that the "equities involved and the other competing interests of the two jurisdictions should also be considered." *Id.* at 268. However, priority of jurisdiction was given primary consideration, "based on the policy that after suits are commenced in one state, it is inconsistent with inter-state harmony to let the courts of another state control their prosecution." *Id.* (citing *James v. Grand Trunk W.R. Co.*, 14 Ill.2d 356, 152 N.E.2d 858, *cert. denied* 358 U.S. 915 (1958)). Ehrenzweig suggests that anti-suit injunctions, such as that entered by the Tennessee court here, might be refused enforcement on the ground they "do not adjudicate the merits of the case," which would certainly be applicable to the facts of *Abney*. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 183 (1962). See also, H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS §§ 216, 218 (4th ed. E. Scoles 1964).

ordered the husband to pay \$10,390 in past-due support and maintenance "as ordered by the Tennessee courts."¹²⁰

2. *Grounds.*—The wife in *Abney v. Abney*¹²¹ argued that the trial court should have exercised its equitable discretion to deny the husband's petition for dissolution, even though it found the marriage was irretrievably broken. The finding of irretrievable breakdown was not challenged by the wife, nor could it have been, in view of the fact that the parties had lived apart since at least 1964.¹²² The wife's opposition to dissolution of the marriage apparently stemmed from concern over termination of her husband's military medical benefits. She suffered from severe rheumatoid arthritis requiring costly medical treatment, and the trial court expressly found that the husband was incapable of providing her with sufficient maintenance to offset the loss of the medical benefits. The court of appeals held that the trial court had no discretion to deny dissolution once it found the marriage was irretrievably broken, and affirmed its decree of dissolution.¹²³

Under the no-fault ground, the key issue is whether there is a reasonable possibility of reconciliation. If on final hearing the court finds that there is such a possibility, the court may continue the matter and order the parties to seek reconciliation through counseling.¹²⁴ However, if the court finds that the marriage is irretrievably broken—that there is *no* reasonable possibility of reconciliation—then "the court *shall* enter a dissolution decree."¹²⁵ The dissolution decree is mandatory once the finding of irretrievable breakdown is made.

The courts' disposition of the *Abney* case undoubtedly works a hardship on the wife. Although maintenance was awarded to her, it was admittedly insufficient to provide for her medical needs. Yet denial of the divorce would have done violence to the statute, and would have worked a hardship on the husband. To have condemned

¹²⁰374 N.E.2d at 269. A foreign judgment for arrears in support is entitled to full faith and credit in other states, to the extent that it is final under the law of the state in which it was entered. *Sistare v. Sistare*, 218 U.S. 1 (1909).

¹²¹374 N.E.2d 264 (Ind. Ct. App. 1978).

¹²²The Tennessee separate maintenance decree was dated May 25, 1964, and the parties had lived apart continuously since their initial separation.

¹²³374 N.E.2d at 269-71.

¹²⁴IND. CODE § 31-1-11.5-8(a) (1976). The statute provides:

Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds that there is a reasonable possibility of reconciliation, the court may continue the matter and may order the parties to seek reconciliation through any available counseling . . .

¹²⁵IND. CODE § 31-1-11.5-9(a) (1976) (emphasis added).

him to a lifetime of marriage to a woman with whom he had not lived for fourteen years, solely to assure her continued access to his medical benefits, would have been a questionable exercise of equitable discretion even if such discretion had been found to exist. The court of appeals' disposition of the case appears to be the only possible resolution of an impossible dilemma.

3. *Maintenance.*¹²⁶—Although the Indiana courts' power to award spousal maintenance is sharply limited,¹²⁷ they still possess broad power to award *temporary* maintenance during the pendency of dissolution proceedings.¹²⁸ In *Wendorf v. Wendorf*,¹²⁹ the husband claimed that the trial court abused its discretion in awarding temporary maintenance and child support of \$200 per week. Although the weekly payment ordered was almost equal to the husband's weekly salary, he had substantial additional income.¹³⁰ The court of appeals affirmed the order, holding that the trial court was entitled to consider the temporary nature of the order along with the needs of the spouse and children and the husband's ability to pay.¹³¹ Even a temporary order which exceeded the husband's present earnings would not be *per se* an abuse of discretion.¹³²

¹²⁶Two cases decided during the survey period involved "alimony judgments," which no longer exist in Indiana; all financial awards to spouses are now labeled either as maintenance or property division. See IND. CODE §§ 31-1-11.5-9(c) to 11 (1976). In *Johnson v. Johnson*, 367 N.E.2d 1147 (Ind. Ct. App. 1977), the court of appeals reversed a decree awarding the wife an "alimony" judgment for \$5,500, and remanded the case to the trial court for clarification of the statutory basis for the award.

Lyon v. Lyon, 369 N.E.2d 649 (Ind. Ct. App. 1977), concerned a decree entered in 1961, under the former statute, based upon a written property settlement agreement of the parties. The decree ordered the husband to pay the wife alimony of \$525 per month for the rest of her life, unless she remarried or the husband died. The court of appeals held that the husband was estopped from now challenging the award by reason of his participation in the original divorce proceedings, from which no appeal was taken.

¹²⁷See IND. CODE § 31-1-11.5-9(c) (1976) discussed *infra* at notes 140-80 and accompanying text.

¹²⁸IND. CODE § 31-1-11.5-7(d) (1976) provides: "The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper . . ." IND. CODE § 31-1-11.5-7(e) (1976) provides:

The issuance of a provisional order shall be without prejudice to the rights of the parties or the child as adjudicated at the final hearing in the proceeding. Its terms may be revoked or modified prior to final decree on a showing of the facts appropriate to revocation or modification and it shall terminate when the final decree is entered subject to right of appeal or when the petition for dissolution is dismissed.

¹²⁹366 N.E.2d 703 (Ind. Ct. App. 1977).

¹³⁰Additional income from bonuses and commodity sales amounted to \$6,800 in 1975, and his 1975 tax refund was \$3,200. The wife was not employed.

¹³¹366 N.E.2d at 705.

¹³²*Id.* The court of appeals also upheld the trial court's order requiring the husband to pay \$500 to the wife's attorneys, rejecting the husband's assertion that the wife should have sold her fur coat to pay her attorney's fees. *Id.* at 706.

The only major legislative amendment to the Dissolution of Marriage Act during the 1978 session was to section 31-1-11.5-13, relating to enforcement of support orders.¹³³ The section authorizes the courts to order support payments to be made through the clerk of the circuit court, to require an accounting from the recipient, and to enforce support orders by requiring the obligor to make an assignment of wages to the person entitled to receive the payments. All of these provisions now apply to orders for spousal support, as well as to child support orders.¹³⁴

The legislature also added a new provision, section 13(e)(1), authorizing the court to "enter a judgment against the person obligated to pay support requiring that person to pay all unpaid obligations to the person entitled to receive payments."¹³⁵ With this addition, section 13(e) now provides that, upon application for enforcement of a support order, the court *may* either (1) enter a judgment for arrears, or (2) order the obligor to make an assignment of wages. If the intent was to list all alternatives open to a court when asked to enforce a support order, it is difficult to understand why contempt was not also listed, especially in view of the specific provision of section 31-1-11.5-17(a), authorizing enforcement of support orders by contempt.¹³⁶ The omission may well be cited as implicitly supporting the statements in *Kuhn v. Kuhn*¹³⁷ to the effect that a judgment fixing the amount of the arrearage is necessary before a support decree can be enforced by contempt.¹³⁸ It should be noted, however, that the new provision is permissive rather than mandatory. It could as well have been intended to make it clear that courts do have the power to enter judgments for arrears despite repeal of the former statute expressly authorizing such judgments.¹³⁹

¹³³IND. CODE § 31-1-11.5-13 (Supp. 1978). Amendments to §§ 1 and 3 changed one of the alternative grounds for dissolution from conviction of an "infamous crime" to conviction of "a felony." *Id.* §§ 31-1-11.5-1, -3(a)(2).

¹³⁴Throughout the section, the word "child" and references to § 12, relating to child support orders, have been deleted, so that § 13 now applies to orders "for support." *Id.* § 31-1-11.5-13.

¹³⁵*Id.* § 31-1-11.5-13(e)(1).

¹³⁶*Id.* § 31-1-11.5-17(a) provides, in part: "Terms of the decree may be enforced by all remedies available for enforcement of a judgment *including but not limited to contempt* or an assignment of wages or salary, except as otherwise provided in this chapter." (Emphasis added.) Note that § 17(a) is not limited to support decrees, but applies to *all* "terms of the decree." Despite this broad language, the Indiana Supreme Court has held that contempt is not available to enforce payments ordered as part of a division of property. *State ex rel. Shaunki v. Endsley*, 362 N.E.2d 153 (Ind. 1977).

¹³⁷361 N.E.2d 919 (Ind. Ct. App. 1977). For a critical discussion of *Kuhn*, see *Garfield*, *supra* note 26, at 175; *Townsend*, *supra* note 82, at 281-82.

¹³⁸361 N.E.2d at 920.

¹³⁹Act of Mar. 11, 1967, ch. 282, § 1, 1967 Ind. Acts 901 (repealed 1973). The former statute was also permissive rather than mandatory.

Unfortunately, it may have succeeded only in raising new ambiguities.

4. *Property Division.*—The courts of appeal decided several cases dealing with division of property on dissolution of marriage. Because maintenance, formerly "alimony," can now be awarded only to an "incapacitated" spouse,¹⁴⁰ in the vast majority of cases, property division is the sole vehicle for settling the financial affairs of couples upon divorce. Its importance to the parties involved cannot be over-emphasized.

In *Wilcox v. Wilcox*¹⁴¹ the parties were married in 1949, during their final year in college. After graduation, the wife worked while the husband continued his education; he received a Ph.D. degree in 1952. The wife then quit work to raise three children. At the time of the dissolution, the husband was a tenured full professor at Purdue University, earning \$20,800 per year. The couple had accumulated tangible assets totalling \$42,000. The trial court awarded substantially all of these assets, or their cash equivalent, to the wife, and the Indiana Court of Appeals affirmed.¹⁴²

Both parties were dissatisfied with the trial court's disposition of their property. The husband argued that it was an abuse of discretion to award substantially all of their property to the wife. Normally, a more equal division of property would be appropriate, but the Dissolution of Marriage Act allows the courts to consider many factors in arriving at a "just and reasonable" division of property.¹⁴³ Under the statutory guidelines, the court of appeals held

¹⁴⁰IND. CODE § 31-1-11.5-9(c) (1976) provides:

The court may make no provision for maintenance except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court may make provision for the maintenance of said spouse during any such incapacity, subject to further order of the court. "Incapacitated" has been given a restrictive interpretation by the courts. See *Liszkai v. Liszkai*, 343 N.E.2d 799 (Ind. Ct. App. 1976) (dictum).

¹⁴¹365 N.E.2d 792 (Ind. Ct. App. 1977).

¹⁴²*Id.* at 796.

¹⁴³The relevant portion of IND. CODE § 31-1-11.5-11 (1976) provides:

In determining what is just and reasonable the court shall consider the following factors:

(a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;

(b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;

(c) the economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;

(d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;

that the trial court had not abused its discretion in making an unequal division, because: (1) The wife had contributed to the acquisition of the property; (2) she had relinquished her own education and career; (3) her economic circumstances were "somewhat unsettled," and (4) the husband had "greater probability of high earnings" than the wife, who had only recently obtained her license as a real estate salesperson.¹⁴⁴ The court in effect concluded that the disparity in the parties' earning ability and the wife's contribution to the husband's career over a lengthy marriage were sufficient to tip the scales of equity in her favor. Under the circumstances of this case, an unequal division of assets was equitable.

The wife argued that the trial court had erred in giving too *little* weight to the disparity in earning ability. She contended that the husband's future earnings, discounted to present value (alleged to be \$195,501) should be considered an asset of the marriage, subject to division by the court on dissolution.¹⁴⁵ If this asset were added to the tangible assets of \$42,000, the wife's award of \$42,000 would be but a small fraction of the total (\$237,501) and, therefore, inadequate. Under the wife's theory, an award to her in excess of \$100,000 might have constituted a "just and reasonable" division. The court of appeals was probably correct in rejecting any such result as inequitable, but the reasoning employed by the court is likely to lead to even greater inequities in future cases.

The court "noted" that "any award over and above the [value of the] actual physical assets of the marital relationship must represent some form of support or maintenance,"¹⁴⁶ and that under section 31-1-11.5-9(c), the courts may make no provision for maintenance *except* "when the court finds a spouse to be physically or mentally incapacitated . . .".¹⁴⁷ To treat discounted future income as an asset subject to division would, therefore, run "contra to the statutory provisions forbidding maintenance without a showing of incapacitation."¹⁴⁸ Regardless of the label attached to such an award, "its true

(e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

¹⁴⁴365 N.E.2d at 796. The facts enumerated by the court coincide with some of the factors enumerated in the statute. See IND. CODE § 31-1-11.5-11(a), (c), (e) (1976).

¹⁴⁵The wife also included the capitalized value of her *own* future earnings in the total marital assets, but valued them at only \$14,625. Brief for Appellant at 8, 13. The wife further argued that the trial court should have treated the husband's interest in a retirement plan as an asset subject to division, but neither court considered this argument, on the ground that no evidence was adduced concerning the plan. 365 N.E.2d at 794.

¹⁴⁶*Id.*

¹⁴⁷IND. CODE § 31-1-11.5-9(c) (1976). See note 134 *supra*.

¹⁴⁸365 N.E.2d at 795.

nature would shine through as maintenance."¹⁴⁹ In support of this proposition, the court cited *Liszkai v. Liszkai*,¹⁵⁰ in which there is dictum to the effect that a non-working wife who is unemployable due to lack of marketable skills is not "incapacitated" within the meaning of section 9(c).¹⁵¹

This reasoning overlooks the fact that the true nature of the award actually made by the *Wilcox* court would still "shine through as maintenance,"¹⁵² regardless of whether it exceeded the value of physical assets of the marriage. In justifying the unequal division of property, the court considered, among the factors authorized by section 31-1-11.5-11, the economic circumstances (*i.e.*, the need) of the wife, and the earning ability (*i.e.*, the ability to pay) of the husband. These are the very factors that have always been considered in determining awards of maintenance or alimony.¹⁵³ Without those factors, any "just and reasonable" division would necessarily have been more nearly equal. Of the marital assets of \$42,000, the wife could have expected to receive approximately half, or about \$21,000.¹⁵⁴ The additional \$21,000 which she did in fact receive was clearly intended primarily to meet her support needs; that is, it was "maintenance." If the prohibition of section 9(c) really meant what the court of appeals said it meant, it would necessarily forbid this kind of maintenance award as well. Such an interpretation would bring section 9(c) into irreconcilable conflict with section 11, which clearly authorizes the courts to take support-related factors into account in divisions of property, as the court expressly held in *Wilcox*.

The two holdings of *Wilcox* conflict. On the one hand, it correctly holds that section 11 requires the courts to effect a "just and reasonable" division of property, even if this means that *all* of the property must be awarded to one of the spouses, in cases where

¹⁴⁹*Id.*

¹⁵⁰343 N.E.2d 799 (Ind. Ct. App. 1976), cited in *Wilcox v. Wilcox*, 365 N.E.2d at 795.

¹⁵¹343 N.E.2d at 805-06. Neither of the two concurring judges joined in the opinion of Presiding Judge Buchanan in *Liszkai*. Judge White concurred only in the result, and Judge Sullivan wrote a concurring opinion which expressed disagreement with the restrictive interpretation given § 9(c). *Id.* at 806 (White & Sullivan, JJ., concurring).

¹⁵²365 N.E.2d at 795.

¹⁵³See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 308. *Bahre v. Bahre*, 133 Ind. App. 567, 181 N.E.2d 639 (1962), decided under the former statute, listed as factors in determining alimony "the financial condition and income of the parties and the ability of the husband to earn money." *Id.* at 571, 181 N.E.2d at 641.

¹⁵⁴This is, in fact, the holding of *In re Marriage of Osborne*, 369 N.E.2d 653 (Ind. Ct. App. 1977), discussed at notes 173-76 *infra* and accompanying text, in which the court of appeals reversed a decree awarding the wife a greater share of the marital assets than the husband received where the earning capacity of the two spouses was approximately equal.

there is a gross disparity in earning ability between the two. On the other hand, it holds that, regardless of how great this disparity in earning ability may be, section 9(c) prohibits the courts from awarding a spouse anything over and above the value of the actual physical assets of the marriage, unless the spouse is incapacitated as that term is narrowly defined in the *Liszkai* dictum. These two holdings can coexist in *Wilcox* only because the value of the physical assets of this marriage was substantial. It is at least arguable that the additional \$21,000 the wife received was sufficient to compensate her for the diminished earning capacity resulting from her long years as a non-working wife and mother. But how is a future court, following *Wilcox*, to reach the mandated "just and reasonable" result in a case where the parties had managed to accumulate little or nothing in tangible assets? Would a total award of \$5,000 be sufficient to equalize the disparity in earning ability between a husband earning \$20,000 a year, and his non-working wife of twenty or thirty years, capable of earning only a fraction of that amount? What of a case where there are no assets to divide, but only debts? Would it violate the prohibition of section 9(c) to order the husband to pay those debts? Because such an "award" would exceed the value of the actual physical assets of the marriage, would it not necessarily also be forbidden "maintenance" under the reasoning of *Wilcox*? In this kind of case, it simply will not be possible to achieve a "just and reasonable" result without considering the working spouse's earning ability as an asset subject to division under section 11.¹⁵⁵ The only real question is *how* should earning ability be considered?

The court's discussion of the wife's argument in *Wilcox* suggests that she wanted simply to discount the husband's future income to present value, then divide the result. Such an approach would oversimplify a complex problem. It might be appropriate for measuring the income value—"good will"—of a business, but the earning capacity of an individual is far more uncertain. The individual's future income is subject to contingencies such as disability, death, and unemployment, to a much greater degree than is the future income of a business entity. It is also relevant that this income is to be earned in the future without any further contribution from the wife. The only contribution the wife can claim is to the husband's *present* capacity to earn more income in the future.¹⁵⁶ In attempting to measure the value of her contribution, it might be more useful to

¹⁵⁵IND. CODE § 31-1-11.5-11(e) (1976).

¹⁵⁶*In re Marriage of Horstmann*, 4 FAM. L. REP. (BNA) 3069, 3073 (Iowa 1978) held that "the increase in future earning capacity" made possible by the law degree which his wife had helped him to earn constituted an asset subject to division under the Iowa divorce statute.

look at what she has *lost* through her years as a homemaker rather than at what the husband has gained. What would *her* earning capacity be if she had devoted her time to developing her own career, instead of assisting her husband in developing his?¹⁵⁷ The difference between that figure and her actual present earning capacity should approximate the value of her contribution. Whether it would be "just and reasonable" to require the husband to pay her all or any part of this amount would, of course, depend in turn upon *his* earning capacity.¹⁵⁸

The court of appeals is correct in saying that this kind of award would be equivalent to an award of maintenance, but it is also clearly authorized, if not commanded, by section 11(e).¹⁵⁹ So long as the courts cling to the restrictive definition of an incapacitated spouse given in *Liszkai*, this will be the only way of achieving an equitable result in many cases. An alternative solution would be to give a more expansive reading to the term "incapacitated" in section 9(c). A spouse who is unable to adequately support herself or himself because of "age, lack of education, inexperience and want of vocational skill or training" could reasonably be held to be "incapacitated" within the meaning of section 9(c)¹⁶⁰ and, hence, eligible for an award of maintenance. This award would have the added advantage of flexibility, being subject to modification in the future if the circumstances of either party change.¹⁶¹ Until the legislature acts to remove the tension between sections 9(c) and 11, the courts need to interpret both of these sections so as to do justice to each of the parties to the many traditional marriages which surely still exist in Indiana.

The status of the husband's interest in a retirement plan was also raised by the wife in *Wilcox*, but was not resolved by the court

¹⁵⁷The fact that the wife, a college graduate, had relinquished her own education and career was one of the circumstances relied upon by the court of appeals to support the unequal division of property actually made in *Wilcox*. 365 N.E.2d at 796, discussed in note 144 *supra* and accompanying text.

¹⁵⁸IND. CODE § 31-1-11.5-11(e) (1976) authorizes the court to consider the "earnings or earning ability" of *both* parties in arriving at a "just and reasonable" property division. The wife's argument did in fact attempt to take both parties' earning ability into account, by adding the value of both to the total marital assets. Brief for Appellant at 8, 13; see note 138 *supra*. By dividing the total, the court would achieve a rough equalization of future income between the parties, but this is not necessarily the result to be achieved by a property division on divorce.

¹⁵⁹*Id.*

¹⁶⁰*Liszkai v. Kiszkai*, 343 N.E.2d 799, 806 (Ind. Ct. App. 1976) (Sullivan, J., concurring).

¹⁶¹See IND. CODE § 31-1-11.5-9(c) (1976), quoted at note 140 *supra*, which makes maintenance orders "subject to further order of the court"; *Newman v. Newman*, 355 N.E.2d 867 (Ind. Ct. App. 1976).

because of lack of evidence.¹⁶² However, a similar issue was decided by the court of appeals in a later case. In *Savage v. Savage*,¹⁶³ the husband was already receiving monthly payments under a pension plan which provided for periodic payments during the life of the beneficiary. The trial court ordered the husband to pay one-third of the pension payments, as received, to the wife.¹⁶⁴ The court of appeals reversed, holding that the order constituted an improper award of maintenance under *Wilcox*.¹⁶⁵ The husband did not have a "sufficient vested present interest" in the pension benefits for them to qualify as marital property.¹⁶⁶

In order to reach this result, it was necessary for the court of appeals to distinguish its own recent decision in *Stigall v. Stigall*.¹⁶⁷ The court in *Stigall* had affirmed an order awarding the wife *her own* interest in a pension and profit sharing plan as part of the division of property on divorce.¹⁶⁸ The effect of this was to permit the court to make an offsetting award to the husband of the wife's interest in the residence owned by the parties as tenants by the entireties.¹⁶⁹ The husband in *Stigall* was totally disabled, but the statute in force at the time permitted awards of alimony only to wives. The court's treatment of the pension plan as marital property was a wise exercise of equitable discretion, necessary in order to mitigate the harsh result otherwise mandated by the statute. The same wisdom is necessary today to mitigate the harshness of the limitation on awards of maintenance under the present statute and the limitation on property divisions imposed by *Wilcox*. Instead, the court in *Savage* speaks of "vested present interests" as though it

¹⁶²365 N.E.2d at 794.

¹⁶³374 N.E.2d 536 (Ind. Ct. App. 1978). For another discussion of this case, see Townsend, *Secured Transactions and Creditors' Rights*, 1978 Survey of Recent Developments in Indiana Law, 12 IND. L. REV. 289, 312-13 (1978).

¹⁶⁴The permanent monthly payment under the plan was \$350, but at the time of trial the husband was receiving an additional \$600 per month as an early retirement bonus, which was to expire during 1978. The trial court ordered the husband to pay the wife \$350 per month until the bonus payments terminated, and one-third of the pension payments thereafter. *Id.* at 537.

¹⁶⁵*Id.* at 538-39 (citing *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977), discussed at notes 141-62 *supra* and accompanying text).

¹⁶⁶374 N.E.2d at 538.

¹⁶⁷151 Ind. App. 26, 277 N.E.2d 802 (1972). The *Savage* opinion does point out that the pension plans involved in the two cases are distinguishable, in that the *Stigall* plan was a "fully vested fund of money . . . payable in a lump sum either on retirement or on resignation of employment." 374 N.E.2d at 539 (discussing *Stigall*). However, the *Savage* court ultimately relied on the conflict between the reasoning of *Stigall* and *Wilcox*. 374 N.E.2d at 539.

¹⁶⁸151 Ind. App. at 43-44, 277 N.E.2d at 811.

¹⁶⁹*Id.* at 29-30, 277 N.E.2d at 804.

were resolving a title dispute under property law rather than attempting to achieve a "just and reasonable" result in equity.¹⁷⁰

The court pointed out in *Stigall* that the interest accumulated by the wife in her pension fund and profit sharing plan was "made possible by and through the help and work of her husband . . . without [whose] help and work it would have been impossible for her to have accumulated the amount she did."¹⁷¹ The same equities apply to many pension interests held by husbands and wives today. They should not be overlooked in deference to a supposed legislative intent to ban all payments based on support-related factors, and to confine property divisions to "vested present interests" in tangible personal property. *Savage* adds yet another limitation to the equitable discretion of the courts already unduly restricted by *Liszakai* and *Wilcox*. In many marriages, where the working spouse's interest in a pension or retirement plan is the only substantial asset, it will be impossible for the courts to achieve a truly equitable division of property.

Broad discretionary powers are needed in order for the courts to deal adequately with the many and diverse fact situations presented in dissolution of marriage actions. Further illustration of this diversity is provided by two cases decided during the survey period by the court of appeals.¹⁷² *In re Marriage of Osborne*¹⁷³ reversed a trial court order awarding substantially all of the jointly acquired assets of the marriage to the wife in a case where the earning ability of the wife slightly exceeded that of the husband. The trial court had reached this result by treating the husband's recent inheritance from his mother as an asset subject to distribution, and awarding it to the husband. The bulk of the parties' other property was then awarded to the wife, resulting in a nearly equal division: \$36,700 to the wife and \$42,770 to the husband. An equal division is not necessarily equitable, however.

Section 11 expressly authorizes a court to divide property "acquired by either spouse in his or her own right after the marriage and prior to final separation."¹⁷⁴ Presumably this would include in-

¹⁷⁰In many other states, it is recognized that the property concept of "vesting" has little relevance in proceedings to effect an equitable division of property on divorce. See, e.g., *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *Hutchins v. Hutchins*, 71 Mich. App. 361, 248 N.W.2d 272 (1976); *Pellegrino v. Pellegrino*, 134 N.J. Super. 512, 342 A.2d 226 (1975). California is a community property state; Michigan and New Jersey are common law property states.

¹⁷¹151 Ind. App. at 43, 277 N.E.2d at 811.

¹⁷²*In re Marriage of Patus*, 372 N.E.2d 493 (Ind. Ct. App. 1978); *In re Marriage of Osborne*, 369 N.E.2d 653 (Ind. Ct. App. 1977).

¹⁷³369 N.E.2d 653 (Ind. Ct. App. 1977).

¹⁷⁴IND. CODE § 31-1-11.5-11 (1976).

herited property. However, the statute then instructs the court, in determining what is a "just and reasonable" division, to consider, among other factors, "the extent to which the property was acquired . . . through inheritance or gift."¹⁷⁵ The combined import of these two provisions is that, all other factors being equal (as they were in *Osborne*), the inherited property should be awarded to the inheriting spouse in addition to, rather than in lieu of, his equitable share of the parties' jointly acquired property.¹⁷⁶ It would seem to follow from this interpretation of the statute that in cases where such factors as "economic circumstances" and "earning ability" are not equal, inherited or gift property could be divided as a means of avoiding the "tangible assets" limitation of *Wilcox* or the "vested present interest" limitation of *Savage*.

In the other case, *In re Marriage of Patus*,¹⁷⁷ a working wife argued that a fifty-fifty division of the marital property was inequitable because it indicated that the trial court had ignored her contribution as a homemaker.¹⁷⁸ The court of appeals rejected her contention that a working wife is entitled to a more-than-equal share of marital property because she also functioned as homemaker.¹⁷⁹ The primary purpose of section 11(a) was to make allowance for the contribution of a non-working spouse, whose sole and primary contribution to the marriage was as a homemaker. Where both parties worked, and both parties contributed to the homemaking aspects of the marriage, the courts should not become involved in detailed weighing of their respective contributions.¹⁸⁰

5. *Evidence.*—In an opinion later vacated by the Indiana Supreme Court,¹⁸¹ the court of appeals held that evidence procured by a wiretap in the marital home was not admissible in a divorce ac-

¹⁷⁵*Id.* § 31-1-11.5-11(b).

¹⁷⁶This interpretation of the statute is supported by the concurring opinion of Presiding Judge Staton and is implicit, though not expressly stated, in the opinion of the court. *In re Marriage of Osborne*, 369 N.E.2d 653, 659-60 (Ind. Ct. App. 1977) (Staton, J., concurring). Judge Staton disagreed with the court opinion in its characterization of the inheritance as "acquired" prior to separation of the parties, and questioned the sufficiency of the evidence as to its value. *Id.* at 660.

¹⁷⁷372 N.E.2d 493 (Ind. Ct. App. 1978).

¹⁷⁸IND. CODE § 31-1-11.5-11(a) (1976) lists, among the factors to be considered in dividing property, "the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker."

¹⁷⁹372 N.E.2d at 495-96.

¹⁸⁰When each marital partner brings earnings into the marriage, and these earnings are substantially equal, we do not believe that an exhaustive examination of who washed the dishes, who took out the trash, who painted the house, who changed the oil in the car, who changed the diapers, who paid the bills, and who mowed the lawn is constructive.

Id. at 496.

¹⁸¹*In re Marriage of Lopp*, 378 N.E.2d 414 (Ind. 1978).

tion. In *In re Marriage of Lopp*,¹⁸² the husband had attached a self-activating tape recorder to the home telephone, recording all telephone conversations. A tape of one of the wife's conversations was admitted into evidence in the parties' dissolution of marriage proceedings. The trial court granted the husband's petition for dissolution and granted him custody of the parties' only child. The court of appeals reversed, on the ground that admission of the tape was in violation of the federal wiretap statute.¹⁸³ The decision was carefully limited to the remedy of exclusion of evidence. The court expressed no opinion as to whether the husband would be subject to civil or criminal liability under the statute.¹⁸⁴ The husband argued that the wiretap statute did not apply to domestic relations, there being no "expectation of privacy" between husband and wife.¹⁸⁵ The court could see no reason why the "right to privacy should be totally abrogated upon entry into a marriage," and held that evidence secured through illegal wiretap should be excluded "in any legal proceeding."¹⁸⁶

In vacating this judgment, the Indiana Supreme Court did not express disagreement with the court of appeals' reasoning, but held that the tapes had been properly admitted here in connection with the wife's claim that they had been used by the husband to coerce her into signing a custody agreement.¹⁸⁷ Since the trial judge had already listened to the tapes for this limited and proper purpose, his later ruling admitting the tapes into evidence at the final hearing on the merits did not constitute reversible error. The tapes were then admitted only for the purpose of incorporating all evidence into the final hearing, and the judge neither listened to the tapes again, nor permitted them to be transcribed into the record.¹⁸⁸ Insofar as the final disposition of the merits of the case was concerned, the supreme court accepted the trial court's findings that the evidence of the tapes was "merely cumulative" and its admission therefore

¹⁸²370 N.E.2d 977 (Ind. Ct. App. 1977).

¹⁸³*Id.* at 982. 18 U.S.C. § 2515 (1976) provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

¹⁸⁴*Id.* §§ 2511, 2520.

¹⁸⁵370 N.E.2d at 980.

¹⁸⁶370 N.E.2d at 981.

¹⁸⁷378 N.E.2d at 416. The wife's attorney had expressly consented to the court's listening to the tapes for this purpose.

¹⁸⁸*Id.* at 423.

constituted harmless error.¹⁸⁹ In the supreme court's view of the case, it was unnecessary to decide the broader question decided by the court of appeals, whether wiretap evidence would be admissible on the merits in a dispute over child custody.

6. *Discovery*.—Sanctions for resisting and obstructing discovery were imposed upon the husband in *Finley v. Finley*.¹⁹⁰ The trial court ordered the husband to pay the cost of an audit of a family corporation whose stock constituted the principal marital asset, so that the value of the stock could be ascertained. The court of appeals held that the sanction imposed was not an abuse of discretion under Trial Rule 37(B)(2)(c).¹⁹¹ The husband contended that only expenses for enforcement of the discovery order could be charged against him under the rule. The court of appeals held that “[t]he intent and purpose of the Rule together with the inherent power of the trial court to do those things which are necessary to move the proceedings along to judgment” supported a broader interpretation.¹⁹²

7. *Relief under Trial Rule 60(B)*.—In *Lankenau v. Lankenau*,¹⁹³ the trial court entered a dissolution of marriage decree. As part of the division of property, the court ordered the husband to pay to the wife the sum of \$36,400 in 520 weekly installments of \$70 each. Four months later, the husband filed a motion under Trial Rule 60(B), asking the court to correct the order to provide for 521 installments, so that the payments would qualify for deduction as periodic payments for federal income tax purposes. The trial court found that its original decree was in error in failing to make the payments deductible to the husband and, hence, taxable to the wife, and that the decree should be modified “to accurately reflect the in-

¹⁸⁹*Id.*

¹⁹⁰367 N.E.2d 1126 (Ind. Ct. App. 1977). For another discussion of this case, see Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 52-53 (1978).

¹⁹¹*Id.* at 1127. IND. R. TR. P. 37(B)(2) provides:

The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person responsible for unexcused conduct that is:

....

(c) in bad faith and abusively resisting or obstructing a deposition, interrogatories, production of evidence, inspection, examination, request, question, enforcement order, subpoena, protective order or any other remedy under the discovery provisions of these rules.

¹⁹²367 N.E.2d at 1127. The court also noted that Trial Rule 37(B)(4) authorizes a trial court to enter default judgment or dismissal against a party guilty of resisting or obstructing discovery, *id.*, n.3, implying that the lesser sanction imposed by the trial court here was within its discretionary power.

¹⁹³365 N.E.2d 1241 (Ind. Ct. App. 1977).

tention of the Court.”¹⁹⁴ The court of appeals affirmed the order as a proper exercise of the court’s discretionary power to correct erroneous judgments under Trial Rule 60(B)(1),¹⁹⁵ rejecting the wife’s argument that section 31-1-11.5-17(a) precluded such “modification” of the judgment.¹⁹⁶

Section 17(a) provides that “orders as to property disposition . . . may not be revoked or modified, except in case of fraud”¹⁹⁷ The court of appeals held that this provision has no effect on the courts’ power to grant relief from a judgment under Trial Rule 60(B).¹⁹⁸ Section 17(a) forbids future modification of property division orders based on changes in circumstances occurring *after* the decree is entered.¹⁹⁹ Trial Rule 60(B) authorizes relief from an order based on circumstances existing at *the time the judgment was entered* (mistake in this case).²⁰⁰ Section 17(a) has no relevance in this context. The decision in *Lankenau* appears to be inconsistent with the court of appeals’ statements in *Covalt v. Covalt*,²⁰¹ that relief under Trial Rule 60(B) is limited by the provisions of sections 10(c) and 17(a).²⁰² Any conflict between the two opinions should be resolved in favor of the *Lankenau* holding that Rule 60(B) is not affected by the restrictions on “modification” of decrees contained in the Dissolution of Marriage Act.

E. Marriage

Where an individual contracts two successive marriages, there is a strong presumption that the later of these marriages is valid. The presumption shifts the burden of proof to the party attacking the second marriage, who must prove the negative proposition that the first marriage was *not* ended by death or divorce.²⁰³ Normally, the

¹⁹⁴*Id.* at 1244. The revised decree provided for a total sum of \$36,470, payable in 521 weekly installments of \$70 each. The principal sum would, thus, be paid over more than ten years.

¹⁹⁵IND. R. TR. P. 60(B)(1) provides: “On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons: (1) mistake, surprise, or excusable neglect”

¹⁹⁶365 N.E.2d at 1244.

¹⁹⁷IND. CODE § 31-1-11.5-17(a) (1976).

¹⁹⁸365 N.E.2d at 1244.

¹⁹⁹Such future modification is expressly authorized in the case of child support, IND. CODE § 31-1-11.5-17(a) (1976) and maintenance, *id.* § 31-1-11.5-9(c). See *Newman v. Newman*, 355 N.E.2d 867 (Ind. Ct. App. 1976).

²⁰⁰See *Garfield*, *supra* note 26, at 161-62.

²⁰¹354 N.E.2d 766 (Ind. Ct. App. 1976), *discussed in Garfield*, *supra* note 26, at 161-62.

²⁰²354 N.E.2d at 770-71 (discussing IND. CODE §§ 31-1-11.5-10(c), -17(a) (1976)).

²⁰³*E.g.*, *Boulden v. McIntire*, 119 Ind. 574, 21 N.E. 445 (1889); *Dunn v. Starke County Trust & Sav. Bank*, 98 Ind. App. 86, 184 N.E. 424 (1933); *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1908); *see Annot.*, 14 A.L.R.2d 7 (1950).

presumption operates to vindicate the expectations of the parties, or to protect the legitimacy of children of the marriage,²⁰⁴ but no such equities would apply to the marriage in *Rainier v. Snider*.²⁰⁵ One month after the marriage ceremony, the wife had signed what she described as a "common law divorce," in which she acknowledged that the marriage was "null and void," because of a prior marriage which had never been legally terminated to her knowledge.²⁰⁶ Shortly thereafter, the parties separated, and they never lived together again. It seems clear that neither party expected anything from this brief marriage, and there were no children. Nevertheless, after the husband's death, the wife claimed a share of his estate, and the court of appeals upheld her claim, reversing the trial court's ruling in favor of the administrator of the estate.²⁰⁷

The court of appeals held that the presumption of validity applied, regardless of the equities, and that the estate had not sustained its burden of proving both that the former husband was alive²⁰⁸ and that he had not procured a divorce prior to the wife's marriage to the decedent.²⁰⁹ Although the result may be anomalous on the facts of this case, the presumption generally produces an equitable result, and the court of appeals believed that applying it uniformly in all cases would promote stability and predictability in the law.²¹⁰

A confidential relationship exists between a man and woman about to be married, which imposes on them a duty of fair dealing

²⁰⁴See H. CLARK, *supra* note 83, § 2.7 (1968).

²⁰⁵369 N.E.2d 666 (Ind. Ct. App. 1977).

²⁰⁶*Id.* at 668. The document, prepared by the second husband, read:
I make this statement. I married Russell L. Rainier Sept. 3, 1971 using the name of Mary Lou Miller. I was not divorced from Kermit McClure *to my knowledge*. My real name being Mary Lou McClure. This makes the marriage to Russell Lynford Rainier null and void. We are not married. I can make no claims to that affect. [sic] We will just forget the whole thing. Russell L. Rainier will not prosecute [sic] me as a bigomist. [sic] I will divorce Kermit McClure before marring [sic] again.

Id. (emphasis by the court).

²⁰⁷*Id.* at 669.

²⁰⁸The wife testified that she had not seen or heard from her first husband since their separation in 1967, after a marriage lasting three months. She said she had believed this marriage to be void, because her first husband had not been divorced from his former wife. She also claimed to have explained the situation to her second husband prior to her marriage to him.

²⁰⁹The evidence showed only that the wife had not procured a divorce, and that she did not know of any divorce initiated by the husband. To satisfy its burden, the estate would have to prove both that the first husband was alive at the time of the second marriage, and that no divorce action was filed in any of the places where he had lived since the separation. See *Compton v. Benham*, 44 Ind. App. 51, 85 N.E. 365 (1908).

²¹⁰369 N.E.2d at 670.

toward each other.²¹¹ The court of appeals held in *Blaising v. Mills*²¹² that the same relationship exists between a recently divorced man and wife contemplating reconciliation.²¹³ The plaintiff relied upon her ex-husband's promises of reconciliation when she conveyed real estate and personal property to him, and paid \$300 on his debt to J.C. Penney Company. When the promised reconciliation failed to materialize, plaintiff sued to recover her property and her money. The court of appeals affirmed a judgment in plaintiff's favor, ordering the ex-husband to restore the real estate to her.²¹⁴ The court of appeals accepted the ex-husband's contention that his promise of reconciliation could not be the basis for an action in fraud, since it was a promise to perform in the future, rather than a misrepresentation of an existing fact.²¹⁵ The court, however, held that the confidential relationship which existed between the parties was sufficient to make the ex-husband's promises actionable on a theory of constructive fraud or undue influence,²¹⁶ in what was in essence an action for rescission and restitution.

The court's holding that a confidential relationship existed under the circumstances of this case was based in part on the trial court's findings that plaintiff was suffering from emotional distress and personality disorders which made her substantially dependent on her ex-husband, and that he was aware of her condition.²¹⁷ These findings raise a strong inference that the representations were made to induce plaintiff to act in reliance on them, an important element of constructive fraud.²¹⁸ They also serve to create a presumption of undue influence.²¹⁹ Since both courts implicitly found that the representations of reconciliation made to plaintiff were false, it would appear that the real basis for the confidential relationship

²¹¹Lamb v. Lamb, 130 Ind. 273, 30 N.E. 36 (1892).

²¹²374 N.E.2d 1166 (Ind. Ct. App. 1978).

²¹³On the other hand, a married couple negotiating a divorce settlement has been held *not* to be in a confidential relationship. *Wellington v. Wellington*, 158 Ind. App. 649, 304 N.E.2d 347 (1973).

²¹⁴*Id.* at 1173. The court of appeals allowed defendant a set-off of \$3,683.48 against the \$5,500 damage award. This was the amount he had paid on the mortgage while he held the real estate. *Id.* The damages awarded constituted restitution to plaintiff of benefits conferred on the defendant. They included the rental value of the real estate, the value of an automobile he induced her to trade in, and the \$300 debt she paid for him. *Id.* at 1171.

²¹⁵*Id.* at 1169 (citing *Sachs v. Blewett*, 206 Ind. 151, 185 N.E. 856 (1933); *Wellington v. Wellington*, 158 Ind. App. 649, 304 N.E.2d 347 (1973)).

²¹⁶374 N.E.2d at 1169.

²¹⁷*Id.* at 1170-71.

²¹⁸See *Coffey v. Wininger*, 156 Ind. App. 233, 240-41, 296 N.E.2d 154, 159-60 (1973); *Smart & Perry Ford Sales, Inc. v. Weaver*, 149 Ind. App. 693, 698, 274 N.E.2d 718, 722 (1971).

²¹⁹See *Folsom v. Buttolph*, 82 Ind. App. 283, 296-97, 143 N.E. 258, 262 (1924).

here was not the parties' non-existent "engagement" to be remarried, but the plaintiff's mental condition and her dependence upon her ex-husband, which caused her to repose special confidence and trust in him. Knowing of her condition, he abused her trust to his own advantage. This abuse of trust was sufficient in itself to constitute constructive fraud.

F. Paternity

In *Barkey v. Stowell*,²²⁰ the Indiana Court of Appeals made the following statement regarding the procedure followed in 1947 in awarding child support in paternity cases:

It has been the practice in this state, immemorially, for the judge in bastardy proceedings to hear evidence or not, as he deemed necessary, upon the subject of the amount to be awarded to be paid by the defendant for the support of the child, and in the absence of abuse of discretion, the Appellate Court will not interfere with the finding or judgment as to the amount to be paid.²²¹

This practice was challenged by the father in a 1977 paternity case, *B.G.L. v. C.L.S.*²²² *B.G.L.* did not question the finding of paternity, but argued that the trial court erred in ordering him to pay \$15 per week for the child's support without hearing any evidence as to the child's need or the father's ability to pay. The court of appeals affirmed the order on the ground that there was *some* evidence in the record which was relevant to the support issue.²²³ The court went on to "suggest" that it would be better practice for the trial court "to continue the case for a reasonable time after the determination of paternity and allow the parties to prepare and present evidence specifically on the issue of support."²²⁴ The court of

²²⁰117 Ind. App. 162, 70 N.E.2d 430 (1947). *Barkey* held that the support provisions of a paternity decree were "surplusage and may be disregarded entirely and that reversible error cannot be predicated upon such findings, even if they are not supported by the evidence." *Id.* at 168-69, 70 N.E.2d at 433-34.

²²¹*Id.* at 170, 70 N.E.2d at 434.

²²²369 N.E.2d 1105 (Ind. Ct. App. 1977).

²²³*Id.* at 1107-08. The evidence consisted of testimony as to financial difficulties encountered by the mother and child, the employment of the father, and the previous employment of the mother as a housekeeper. In addition, the record indicated that the judge had interrogated the father concerning his finances before entering the support order. The court of appeals apparently felt this was sufficient to support the modest award made here. "[C]ertainly an award of \$15 per week for the support of the child cannot be deemed *per se* unreasonable, considering the facts and circumstances before the trial court and the reasonable, probable and actual deductions to be drawn therefrom." *Id.* at 1108.

²²⁴*Id.* at 1108. The Court of Appeals also held in *B.G.L.* that the trial court did not err in awarding support for a period preceding the filing of the petition. *Id.* at 1108.

appeals, thus, in effect, rejected the highly questionable practice described in *Barkey*.

The paternity statutes²²⁵ have been repealed and re-enacted as part of the new juvenile code.²²⁶ A number of changes have been made in the statutes, most of them simply involving the rewording and reorganization of its provisions. Several provisions dealing with the quasi-criminal aspects of paternity actions, such as arrest of the defendant in lieu of summons,²²⁷ and the provision that the alleged father "shall not be compelled to give evidence,"²²⁸ have been deleted. Also omitted are all references to imprisonment for contempt,²²⁹ and the provision for modification of support orders.²³⁰ Provisions relating to the putative father's right to remain silent and enforcement of support orders by contempt are included in other chapters of the code.²³¹ Since the statute continues to impose on parents of children born out of wedlock the same obligations as are imposed on parents of legitimate children,²³² presumably the modification provisions of the Dissolution of Marriage Act will be applicable to orders for support of illegitimate children.²³³

X. Evidence

*Henry C. Karlson**

A. Hearsay; Patterson Reconsidered

The departure from the traditional hearsay rule, announced by the Indiana Supreme Court in *Patterson v. State*,¹ was carried to its logical, although perhaps not reasonable, extreme in *Flewallen v. State*.² In *Patterson* the court held that extrajudicial statements

IND. CODE § 31-4-1-26 (1976) authorizes recovery for "accrued support" for not more than two years prior to the bringing of the action.

²²⁵IND. CODE §§ 31-4-1-1 to 33, 31-4-2-1, -2 (1976).

²²⁶*Id.* §§ 31-6-6-1 to 22 (Supp. 1978) (effective Oct. 1, 1979).

²²⁷*Id.* § 31-4-1-13 (1976) (repealed effective Oct. 1, 1979).

²²⁸*Id.* § 31-4-1-16.

²²⁹*Id.* §§ 31-4-1-20, -22, -24.

²³⁰*Id.* § 31-4-1-19.

²³¹*Id.* §§ 31-6-3-3(5), -7-15 (Supp. 1978) (effective Oct. 1, 1979).

²³²*Id.* § 31-6-6-2.

²³³*Id.* § 31-1-11.5-17 (1976).

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¹263 Ind. 55, 324 N.E.2d 482 (1975).

²368 N.E.2d 239 (Ind. 1977).

made by witnesses available for cross-examination may be used as substantive evidence.³ It should be noted, however, that the statements in *Patterson* were arguably admissible for limited purposes, and the holding only meant that no limiting instructions were necessary.⁴

The appellant in *Flewallen* was convicted of second degree murder. At trial, prior statements of six witnesses made to the police, coroner, and grand jury were used as substantive evidence by the state over objection by the appellant. Two statements were read only after those witnesses had been questioned concerning the events. The remaining four witnesses were called for the purpose of authenticating their respective statements which were read to the jury before the witnesses were asked any relevant questions. The majority upheld the state's use of extrajudicial statements, citing the court's holding in *Patterson*.⁵ The dissent warned, however, that

³In *Patterson* the court made reference to FED. R. EVID. 801(d) which provides in part:

Statements which are not hearsay. A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his prior testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence of motive

The court then went beyond the federal rule and held that, if the declarant is available for cross-examination, his extrajudicial statement is not hearsay, even if it were not made under oath. The court noted that the advisory committee on the federal rules of evidence had not required that prior inconsistent statements be made under oath in order to be substantive evidence, and concluded that the availability of the declarant for cross-examination is an adequate safeguard. 263 Ind. 55, 58, 324 N.E.2d 482, 485. The court, however, did not justify going beyond the federal rule as it relates to prior consistent statements. Unlike what has become known as the *Patterson* rule, the federal rule, both as proposed and as passed by Congress, permits the use of a prior consistent statement only under limited circumstances created when the opposite party opens the door for its admission.

"Two statements were admitted without limiting instructions. One was admitted after the defendant had confronted a prosecution witness with parts of a prior statement, seeking to impeach her. Thereafter, the court permitted the prosecution to introduce the entire written statement. Even if the entire statement were not substantive evidence, the prosecution would be permitted to introduce it in order to present to the jury the context of the excerpts referred to by the defense so as to rebut any inference that her present testimony was inconsistent with her prior statement. See *Carroll v. State*, 263 Ind. 696, 338 N.E.2d 264 (1975); FED. R. EVID. 106. The second statement was offered by the state as a prior inconsistent statement in an effort to impeach its own witness, who was also the wife of the accused. Assuming that the state had shown a proper foundation for impeaching its own witness, her prior statement was admissible for purposes of impeachment. See M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 33 (1977).

⁴368 N.E.2d at 241.

the majority sanctioned indiscriminate use of extrajudicial statements and relieved the state of any obligation to even attempt to prove its case through testimony given in open court.⁶ The dissent determined this approach to be a vastly different use of extrajudicial statements than that sanctioned by the United States Supreme Court in *California v. Green*⁷ where: "The Court was therefore required to choose between permitting substantive evidentiary use of his prior statements and the total loss of relevant and necessary evidence."⁸

Criticism of the majority opinion appears to be justified. At least four of the statements served no purpose other than to bolster the in-court testimony of the state's witnesses, thereby allowing the state to have its witnesses repeat their testimony while giving more emphasis to its content. As it would be improper for the court to permit the state's witnesses to repeat their testimony over objection on direct examination,⁹ it is equally improper to permit the state to use prior statements for that purpose. The out-of-court statements held admissible in *Flewallen* were by no means necessary in order for the jury to obtain information it would not otherwise have been able to receive.¹⁰

Inherent in dicta of *Samuels v. State*,¹¹ is the premise *Flewallen* allows extreme permissiveness. *Samuels*, which may have overruled *Flewallen*, has limited the application of the *Patterson* rule. *Samuels* was convicted, in a jury trial, of committing a felony (robbery) while armed and was sentenced to twenty years confinement. In his appeal of the conviction, he attempted to have the court reconsider its decision in *Patterson*. His attempt was unsuccessful because the extrajudicial statement used at trial was admitted only for purposes of impeachment and was, therefore, admissible even under the traditional hearsay rule.

After recognizing that the *Patterson* decision "has been both praised and condemned by knowledgeable lawyers, judges and writers,"¹² the *Samuels* court endeavored to limit *Patterson* by

⁶*Id.* at 243 (DeBruler, J., dissenting).

⁷399 U.S. 149 (1970).

⁸368 N.E.2d at 243 (DeBruler, J., dissenting).

⁹"Many times the same question will be asked of a witness after it has been asked and answered The general rule is not to permit such questioning because repetition may give excessive emphasis to selected evidence." E. BROWNLEE, TRIAL JUDGES GUIDE, OBJECTIONS TO EVIDENCE § 2.3 (1974).

¹⁰"Although there were some minor conflicts, most of the statements were consistent with the statements given by the witnesses on the stand, though the previous statements were more detailed in each case." 368 N.E.2d at 241.

¹¹372 N.E.2d 1186 (Ind. 1978).

¹²*Id.* at 1187.

stating: "It appears that the rule drawn from *Patterson* may well be in need of reconsideration. To the extent that it has, on some occasions, been used to support the admission of out-of-court statements as a mere substitute for available in-court testimony, it has been misapplied."¹³ Although *Samuels* makes no reference to the court's decision in *Flewallen*, the two opinions are clearly inconsistent.

The future of the *Patterson* rule is uncertain after *Samuels*. Nonetheless, some reasonable conclusions may be reached about the direction that should be taken in future cases. Extrajudicial statements made by witnesses available for cross-examination have long been admissible when offered to prove something other than that which is asserted in the statement.¹⁴ An example of such non-hearsay use of an extrajudicial statement is found in *Samuels*, where the statement was admissible for impeachment. Traditionally, if a statement is used for this limited purpose, the opposing party has been permitted to have an instruction limiting the use of the evidence.¹⁵ The value of a limiting instruction has been questioned by legal scholars¹⁶ and in *Samuels* the court stated: "At most, he would have been entitled to have the jury admonished against considering the evidence for purposes other than impeachment—*relief of questionable value . . .*"¹⁷

It appears that the low value of limiting instructions should be recognized by the court in permitting otherwise admissible extrajudicial statements of available witnesses to be used as substantive evidence. Limiting the *Patterson* rule to those situations in which the statement is already admissible for some other purpose will lend support for eliminating a party's use of carefully prepared extrajudicial statements, a subject of some concern to the legal scholars who have considered rules similar to that adopted in *Patterson*.¹⁸

¹³*Id.*

¹⁴"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein." *Harvey v. State*, 256 Ind. 473, 476, 269 N.E.2d 759, 760 (1971) (quoting *Wells v. State*, 254 Ind. 608, 261 N.E.2d 865 (1970)). Thus, where the testimony or written evidence is offered merely to show that the prior statement was made, without concern for the truth of the statement, it is not hearsay. See MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE §§ 33-37, at 66-75 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; FED. R. EVID. 801(c).

¹⁵See 372 N.E.2d at 1188.

¹⁶Professor Cleary states, "Allowing [a prior inconsistent statement] as substantive evidence pays an added dividend in avoiding the ritual of a limiting instruction unlikely to be heeded by a jury." MCCORMICK, *supra* note 14, § 251 at 604.

¹⁷372 N.E.2d at 1187 (emphasis added).

¹⁸UNIFORM RULES OF EVIDENCE 63 (1953) (superseded 1974), provided:

Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) . . . A statement previously made by a

Situations where the extrajudicial statements would not be admissible for other purposes, such as those in which a witness suffers a true loss of memory, should be dealt with on a case-by-case basis using a standard similar to that set by Federal Rules of Evidence 803(24) and 804(5).¹⁹

B. Separation of Witnesses

Separation of witnesses, a common prophylactic measure taken at trials and hearings, is the subject of two recent decisions. In *Brannum v. State*,²⁰ the appellant was convicted of first degree murder. A witness for the state, Melvin Dean Burns, was in the custody of the county sheriff. Even though Burns and his common law wife were charged with the same murder as the appellant, they were permitted to plead guilty to manslaughter. During the trial Burns testified that the sheriff had discussed the case with him and had attempted to influence him to testify in favor of the appellant. Circumstances indicated some concert between appellant and the sheriff.

Although the sheriff had been in the courtroom during the testimony of several witnesses, and a separation of witnesses rule had been imposed at appellant's request, appellant sought to call the

person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness

The California Law Revision Commission recommended against adoption 63(1) of the UNIFORM RULES OF EVIDENCE as it

would permit a party to put in his case through written statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination. The prohibition against leading questions on direct would be avoided and much of the protection against perjury provided by the requirement that in most instances testimony be given under oath in court would be lost.

4 CALIF. L. REV'N COMM'N REPORTS, RECOMMENDATIONS AND STUDIES, TENTATIVE RECOMMENDATION RELATING TO THE UNIFORM RULES OF EVIDENCE—HEARSAY EVIDENCE 307, 313 (1962). Compare this prediction with the actions of the prosecution in *Flewallen*.

¹⁹These exceptions to FED. R. EVID. 802, the federal hearsay rule, permit the use of a statement not specifically covered by any other exception but having equivalent circumstantial guarantees of trustworthiness and the court determines:

(i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence.

The adverse party must also be given notice sufficiently in advance of the hearing to provide him with a fair opportunity to prepare to meet the evidence. FED. R. EVID. 804(5).

²⁰366 N.E.2d 1180 (Ind. 1977).

sheriff as a witness. Burns' testimony had made the calling of the sheriff a matter of great importance to the defense. Appellant planned to impeach Burns by testimony that no attempt had been made by the sheriff to influence him. Defense counsel's move to permit the sheriff to testify was based on the grounds that he was not a regularly scheduled witness, and that there was no knowledge on the part of the defense or the witness that his testimony would be needed.²¹ Although the prosecution entered no objection, the judge *sua sponte* ruled that the witness could not testify due to the separation of witnesses rule.²² The supreme court correctly found this to be an abuse of the trial court's discretion.²³

If there is no connivance or collusion by the party calling the witnesses, it is accepted law that the court, within its discretion, can permit a witness to testify even though the witness has violated the court's separation of witnesses order.²⁴ Further, refusing to permit such a witness to testify, where the party calling the witness is not at fault for the violation, has been held to be prejudicial error.²⁵ Applying the standards announced in prior cases to *Brannum*, it is clear that the judge's ruling was an abuse of discretion, particularly because the prosecution made no objection to the testimony.²⁶

The court was faced with circumstances quite different from those found in *Brannum* in *In re Wireman*.²⁷ Wireman, an attorney, was the respondent in a disciplinary proceeding conducted by the hearing officer. At the start of the proceedings, the respondent requested and was granted a closed hearing. On several occasions the hearing officer admonished witnesses, in the presence of counsel, not to disclose their testimony to anyone outside the hearing room. There was, however, unlike *Brannum*, no formal separation of witnesses.

During the hearing it was discovered that portions of the hearing, either taped or transcribed, had been provided to witnesses by the respondent. The hearing officer suppressed the testimony of the witnesses to whom respondent had furnished this prior testimony. Respondent claimed that this ruling was error, because no formal separation of witnesses had been ordered.

²¹*Id.* at 1183.

²²*Id.* at 1184.

²³*Id.*

²⁴See *Butler v. State*, 229 Ind. 241, 97 N.E.2d 492 (1951); *Kelly v. State*, 226 Ind. 148, 78 N.E.2d 547 (1948); *Romary v. State*, 223 Ind. 667, 64 N.E.2d 22 (1945).

²⁵*McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960); *Taylor v. State*, 130 Ind. 66, 29 N.E. 415 (1891); *State ex rel. Steigerwald v. Thomas*, 111 Ind. 515, 13 N.E. 35 (1887).

²⁶The court also found that the trial judge by his conduct and demeanor improperly imposed himself on the proceedings and denied the appellant a fair trial. 366 N.E.2d at 1182.

²⁷367 N.E.2d 1368 (Ind. 1977), *cert. denied*, 98 S. Ct. 2234 (1978).

The court found the respondent's argument emphasized form over substance and denied his appeal.²⁸ It held: "[T]he record is clear that the Hearing Officer, throughout the proceeding, considered this a private hearing which incorporated the protection of an order for separation."²⁹ The court's holding is correct.

The request for a closed hearing has as its root the desire to keep possibly prejudicial information from becoming public. A motion for separation of witnesses is founded upon the belief that if witnesses discuss their testimony, or become aware of the testimony of others, the value of their evidence is diminished. Although it is clear that one may have a separation of witnesses without ordering a closed hearing, the order for a closed hearing is almost without value if witnesses and counsel are free to disclose the testimony given once they leave the courtroom. In *Wireman*, the witnesses were admonished not to discuss their testimony with anyone outside the hearing room. A similar admonishment to counsel not to disclose the testimony was not necessary because such an order was inherent in the order for a closed hearing.³⁰ Although the sanction for respondent's violations of the hearing officer's order was drastic, it was within the hearing officer's proper exercise of discretion.³¹

C. Expert Witnesses

In *Morris v. State*,³² the appellant was convicted of second degree murder. His conviction rested partly on the testimony of a physician, who was also a coroner, that the victim died from blows to his head. Although the witness had not performed an autopsy on the victim, one had been performed by another physician, a member of the coroner's staff. The physician who had performed the autopsy died on the very morning he was to testify. The autopsy report was never put into evidence; however, medical records and findings by doctors, who had treated the victim from the time of his injury to the time of his death, were admitted into evidence by agreement of the parties. The testifying physician used the records as well as the autopsy report in forming his opinion. Appellant claimed error in the admission of this expert's testimony because it was opinion based on hearsay. The court denied the appeal citing *Bivins v. State*,³³ and *Smith v. State*,³⁴ as authority for the rule that a medical doctor may

²⁸367 N.E.2d at 1372.

²⁹*Id.*

³⁰*Id.*

³¹See *Myslinski v. State*, 257 Ind. 453, 275 N.E.2d 544 (1971); *McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960).

³²364 N.E.2d 132 (Ind. 1977), *cert. denied*, 98 S. Ct. 526 (1978).

³³254 Ind. 184, 258 N.E.2d 644 (1972).

³⁴259 Ind. 187, 285 N.E.2d 275 (1972), *cert. denied*, 409 U.S. 1129 (1973).

give an opinion as to cause of death even though his opinion is partially based upon records not in evidence.³⁵ Although neither of the cases cited alone stands for the holding in *Morris*, in combination they support the ruling.

In *Bivins*, the physician who testified had performed the autopsy, unlike the physician in *Morris*. *Bivins* stands for the rule that it is not improper for a physician to state his opinion as to the cause of death, even though it goes to an ultimate issue.³⁶

The legal issue in *Smith* was similar to that in *Morris*. In *Smith* the sole issue raised on appeal was whether the testimony of two court-appointed expert witnesses should have been excluded because they had based their opinions, in part, on information gained from hospital reports, the writers of which were not present in court to be cross-examined. The court held that records not directly admissible into evidence may be used by an expert witness in formulating his opinion of a person's sanity. The holding in *Smith* is limited: "The types of records and reports which can be utilized should only be those produced by qualified personnel and the type which an expert customarily relies on."³⁷ *Morris* combined with *Smith* indicates that the Indiana Supreme Court is moving in the direction of adopting a rule similar to that contained in Federal Rule of Evidence 703.

Experts, by their very nature, depend upon "hearsay" information in reaching their opinions. The education of an expert consists of his learning many facts never presented in court and the theories and opinions of authors, scholars, and professors who will never be available for cross-examination. An expert who bases his opinion on the latest literature in his field is only acting in accord with the standards and demands of his profession.

The court should make more explicit the policy inherent in *Morris* and *Smith* which permits experts to base their testimony on information not admitted or admissible. This could be accomplished by adopting Federal Rule of Evidence 703 which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

³⁵364 N.E.2d at 138.

³⁶In *Bivins* the physician had conducted a thorough and complete autopsy upon the body. He testified extensively concerning the autopsy, and used it as the basis of his opinion. On cross-examination the defendant did not challenge the autopsy as a basis of the opinion.

³⁷259 Ind. at 190, 285 N.E.2d at 276. In support of this rule, the court cited United States v. Bohl, 445 F.2d 54 (7th Cir. 1971), and Commonwealth v. Thomas, 444 Pa. 436, 282 A.2d 693 (1971). It then held: "Such a limitation guarantees a relatively high degree of reliability and frees an expert to use the tools he normally relies upon in making any diagnosis." 259 Ind. at 191, 285 N.E.2d at 276.

by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.³⁸

D. Privilege

1. *Physician-Patient.*—The “Indiana Rule” which provides that only the personal representative of the decedent can waive a decedent’s physician-patient privilege in a will contest came under attack and met its too-long-delayed demise in *Haverstick v. Banet*.³⁹ While the statute creating the privilege speaks specifically as to the matters which fall within the scope of the privilege, it is silent as to the issues of waiver and the effect on the privilege of the patient’s death.⁴⁰ Notwithstanding the statute’s silence on these issues, Indiana law on this subject had remained constant and clear for over seventy years.⁴¹

In *Haverstick*, the defendants in the will contest argued that the personal representative was the only person who stood in the place of the deceased and, therefore, he was the only one who inherited from the deceased the right to waive the privilege. Although this was in accord with prior Indiana case law,⁴² the supreme court

³⁸FED. R. EVID. 703. The rule gives the trial judge discretion to determine whether the facts or data could be reasonably relied upon. See generally 3 J. WEINSTEIN, & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 703[01], at 703-04 (1977) [hereinafter cited as J. WEINSTEIN].

³⁹370 N.E.2d 341 (Ind. 1977).

⁴⁰IND. CODE § 34-1-14-5 1976 provides: “The following shall not be competent witnesses . . . Physicians as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases.” Although the statute speaks in terms of competency, the courts have dealt with the statute as though it created a waivable privilege. See *Doss v. State*, 256 Ind. 174, 267 N.E.2d 385 (1971); *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889); M. SEIDMAN, *supra* note 4, at 91.

⁴¹In 1889 the Indiana Supreme Court held that the administrator of the deceased’s estate was the representative of the decedent and, in seeking to uphold the will, could waive the privilege. *Morris v. Morris*, 119 Ind. 341, 21 N.E. 918 (1889). Later in *Towles v. McCurdy*, 163 Ind. 12, 71 N.E. 129 (1904), when faced with the issue of an heir’s right to waive the privilege, the court wrote:

For obvious reasons, when the controversy is among heirs and devisees, the set of such heirs or devisees who strive to overthrow the will can not, for their own benefit, and against the wishes of the other set, who desire to sustain it, waive the objection to evidence otherwise incompetent, to the detriment of the interests of those who seek to establish the will.

⁴²163 Ind. at 15, 71 N.E. at 130. Of the states which have decided cases under statutes similar to the one in question, Indiana is the only one to have adopted this rule. See Annot. 97 A.L.R.2d 393 (1964).

⁴²*Id.*

granted a petition to transfer and found the argument to be flawed. After considering the action of courts in other jurisdictions regarding this issue,⁴³ the court ruled that prior Indiana decisions were wrong and that an heir, as well as the personal representative, may waive the physician-patient privilege—a holding too long delayed.

Policy considerations underlying the privilege deal with benefits arising from promoting and protecting a confidential relationship between a patient and his physician which is primarily devoted to aiding the effective treatment of injuries and disease. Society benefits from its members receiving medical aid that they might otherwise be reluctant to request. It is felt that fear of embarrassment or other difficulties arising from the disclosure of private medical problems would prevent some people from obtaining needed medical treatment.⁴⁴

After the death of an individual, much of the policy underlying the privilege is no longer applicable. At this point, the main benefit is that it protects a decedent's reputation. The interest of society in protecting a decedent's reputation is, however, no greater than that of an heir. If an heir determines the decedent's medical history is necessary for a just determination of testamentary capacity, then the personal representative's interest in preserving the decedent's will cannot reasonably be said to outweigh the heir's interest in protecting the decedent's property from unwarranted diminution.⁴⁵

The main flaw in the earlier Indiana cases was the assumption that the paper in dispute was the will of the deceased.⁴⁶ If the very purpose of the contract is to determine whether the deceased in fact made a will, the assumption appears to be unwarranted. When the executor is also the largest legatee under the will, as in *Haverstick*, the inequitable nature of the rule becomes obvious. As stated by the Iowa Supreme Court:

The paramount purpose . . . should be to ascertain whether the instrument presented is in fact the will of the deceased. And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by

⁴³The court considered *Winters v. Winters*, 102 Iowa 53, 71 N.W. 184 (1887); *In re Koenig's Estate*, 247 Minn. 580, 78 N.W.2d 364 (1956); and *Membke v. Unke*, 171 N.W.2d 837 (N.D. 1969).

⁴⁴See generally MCCORMICK, *supra* note 12, §§ 98-105, at 213-28.

⁴⁵"The power of an heir may also be conceded if we remember that the heir first, is at least equally interested in preserving the ancestor's reputation, and second, has an equal moral claim to protect the deceased from unwarranted diminution." J. WIGMORE, *LAW OF EVIDENCE* § 2291 (J. McMaughon ed. rev. 1961).

⁴⁶See *id.*

establishing or defeating the instrument as the truth so ascertained may require. The testimony of the attending physician is usually reliable, and often controlling, and to place it at the disposal of one party to such a proceeding and withhold it from the other would be manifestly partial and unjust.⁴⁷

2. *Husband-Wife.*—In *Rice v. State*,⁴⁸ the appellant raised as error the testimony of his former wife; in violation of Indiana Code section 34-1-14-5,⁴⁹ concerning private communications he made during their marriage. The record showed that appellant and his wife were married on December 20, 1972; at least the "wife" believed they were married then. On December 10, 1975, the wife filed a petition for annulment of the marriage alleging that appellant was married at the time he entered into the marriage with her and that he had told her he was unmarried. The petition asked that the marriage be declared null and void. She also testified that she was no longer married to the appellant. This testimony was given at a motion in limine through which the defense sought to suppress her testimony.

Although the state presented no evidence other than the testimony of the alleged wife, the supreme court found her testimony was sufficient to support the trial court's determination that there was no privilege between the parties. It noted that appellant could have, but chose not to, contradict his former wife's testimony.

The court was clearly correct in its holding. As the petition filed by the alleged wife for annulment of her marriage, and her statements concerning the prior marriage of the defendant did not deal with confidential communications, her testimony on this matter could not have violated the husband-wife privilege.⁵⁰ Her testimony

⁴⁷Winters v. Winters, 102 Iowa at 54, 71 N.W. at 185.

⁴⁸370 N.E.2d 902 (Ind. 1977).

⁴⁹IND. CODE § 34-1-14-5 (1976) provides in part: "The following persons shall not be competent witnesses: . . . Husband and wife, as to communications made to each other." The privilege has not been applied if the wife is the victim of a criminal act by the husband. *Doolittle v. State*, 93 Ind. 272 (1883). It has been applied, however, subsequent to a divorce as to matters communicated during the marriage. *Kreager v. Kreager*, 192 Ind. 242, 135 N.E. 660 (1922). It also survives the death of the spouse. *Richard v. State*, 262 Ind. 534, 319 N.E.2d 118 (1974); *Stanley v. Montgomery*, 102 Ind. 102, 26 N.E. 213 (1885).

⁵⁰Like the rule contained in proposed FED. R. EVID. 505, which was not adopted, the husband-wife privilege in Indiana applied only to communications made privately to the spouse and not intended for disclosure to a third party. Acts may be considered communications for the purposes of this rule. *Smith v. State*, 198 Ind. 156, 162, 152 N.E. 803, 805 (1926). It is not, however, a rule of general incompetency. M. SEIDMAN, *supra* note 4, at 87.

is, however, clearly hearsay. She had no personal knowledge of the appellant's prior marriage. Her testimony concerning the contents of the petition for annulment was also hearsay and perhaps a violation of the best evidence rule. Nevertheless, the court's reliance upon this evidence, which would be inadmissible hearsay if offered to prove these matters at a trial on the merits, was proper. In this respect the opinion follows Federal Rule of Evidence 104(a) which provides: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges."⁵¹

3. *Plea Bargaining.*—In *Wright v. State*,⁵² while denying the appeal of a convicted murderer, the Indiana Supreme Court adopted the American Bar Association's Standards Relating to Pleas of Guilty section 3.4 which states:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.⁵³

Although an earlier case had determined that evidence relating to the plea bargaining process was not admissible when offered by the state,⁵⁴ *Wright* is the first case dealing with the converse of this rule. Plea bargaining has become an accepted part of our criminal

⁵¹FED. RULES OF EVID. 104(a). The Advisory Committee to the Federal Rules of Evidence stated in discussing FED. R. EVID. 104(a):

The rule provides that the rules of evidence in general do not apply to this process [of determining the admissibility of evidence]. MCCORMICK §53, p. 123, n.8, points out that the authorities are "scattered and inconclusive," and observes: "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay." This view is reinforced by practical necessity in certain situations.

Indiana would benefit by formally adopting FED. R. EVID. 104(a).

⁵²363 N.E.2d 1221 (Ind. 1977).

⁵³AMERICAN BAR ASSOCIATION, MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.4 (1968).

⁵⁴*Moulder v. State*, 154 Ind. App. 248, 289 N.E.2d 522 (1972). In *Moulder*, where the evidence was offered by the prosecution, the court held: "Any communication relating to the plea bargaining process is privileged and inadmissible in evidence unless the defendant has subsequently entered a plea of guilty which has not been withdrawn." *Id.* at 258-59, 289 N.E.2d at 528.

justice process. Full and free discussion between prosecution and defense will be stimulated by the privilege. It should be noted, however, that section 3.4 only relates to discussions and agreements with the prosecuting attorney. Plea discussions with the police are not privileged.⁵⁵

4. *Probation Officers.*—A young armed robber, in *Massey v. State*,⁵⁶ found that his statement made to a juvenile probation officer was admissible in evidence. Although under eighteen years of age at the time of the offense, he had reached his eighteenth birthday prior to talking with the officer. It was, therefore, not necessary for a parent or guardian to be present during the making of the statement.⁵⁷ His claim of privilege based on Indiana Code section 33-12-2-22,⁵⁸ a statute providing a limited confidentiality for statements made to a juvenile probation officer, was also found to be unjustified.

Viewing the entire statute, the court held that it is apparent the legislature's intent was to provide protection for juveniles within the juvenile court system.⁵⁹ The express language of the statute, however, reveals that the legislature realized situations would arise in which it would be necessary for a judge to order that the information be made available. As the appellant had been given his full *Miranda* warnings, he could have had no misunderstanding at the time he gave the statement that there was a possibility the statement could be used against him at trial.

E. Scientific Evidence

1. *Polygraph Tests.*—The state's failure to follow strict technical foundation requirements for the admissibility of a polygraph

⁵⁵See AMERICAN BAR ASSOCIATION, *supra* note 53, §3.4, Commentary.

⁵⁶371 N.E.2d 703 (Ind. 1978).

⁵⁷In order to use a confession given by a juvenile, the Indiana Supreme Court has held it is necessary for the juvenile to have a meaningful opportunity to consult with his parent or guardian. *Bridges v. State*, 260 Ind. 651, 299 N.E.2d 616 (1973); *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972).

⁵⁸The statute reads in pertinent part:

(c) All information and data obtained by a probation officer in the discharge of his official duties shall be privileged information and shall not be disclosed outside the probation department unless otherwise ordered by the court.
(d) Information or data received by a probation officer in the discharge of his official duties shall not be admitted into evidence at any fact finding hearing, except that the court may, unless otherwise prohibited by law, order information or data actually obtained by the probation officer to be so admitted ..

IND. CODE § 33-12-2-22 (1976).

⁵⁹371 N.E.2d at 706.

test,⁶⁰ coupled with the weakness of other evidence, brought about the reversal of a conviction for theft in *Owens v. State*.⁶¹ The court of appeals adopted, in their entirety, the prerequisites for the use of polygraph test results set forth by the Arizona Supreme Court in *State v. Valdez*,⁶² and found that the county prosecutor's failure to sign a written stipulation providing that the results of the polygraph examination would be admissible at trial on behalf of either defendant or the state, prior to the defendant's submitting to the test, made the results inadmissible.⁶³ Although the appellant signed a form which purported to be a stipulation on his part and on the part of the county prosecutor waiving any objection to the admissibility of the results of the polygraph test, neither the prosecutor nor any officially recognized representative from his office signed it. Viewing the stipulation as a form of contract, the court found that, if the state is not bound by the stipulation, neither is the defendant.⁶⁴

By adopting the Arizona Supreme Court's holding in *Valdez*, the court mandated:

(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.

(2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.

(3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:

- a. the examiner's qualifications and training;
- b. the conditions under which the test was administered;
- c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

⁶⁰Indiana follows the minority rule which allows the results of a polygraph test to be admitted by stipulation or waiver of the parties. *Reid v. State*, 259 Ind. 166, 285 N.E.2d 279 (1972). See *Moore v. State*, 369 N.E.2d 628 (Ind. 1977); *Vacendak v. State*, 264 Ind. 101, 340 N.E.2d 352, cert. denied 429 U.S. 851 (1976). See generally M. SEIDMAN, *supra* note 4, at 74-76; MCCORMICK, *supra* note 14, § 207.

⁶¹373 N.E.2d 913 (Ind. Ct. App. 1978).

⁶²91 Ariz. 274, 371 P.2d 894 (1962).

⁶³373 N.E.2d at 915 (quoting 91 Ariz. at 283, 371 P.2d at 900).

⁶⁴373 N.E.2d at 915.

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.⁶⁵

These prerequisites largely reflect the present Indiana law dealing with polygraph examinations; however, prior cases looked to the waiver by the party against whom the evidence was offered, not the waiver of the party offering the evidence in determining that the evidence was admissible.⁶⁶ *Owens*, in adopting the succinct and well-reasoned Arizona Supreme Court opinion in *Valdez*, held that a waiver which is not binding on both parties may be withdrawn prior to the admission of the polygraph test.⁶⁷ Thus, with this decision, the *Owens* court created new law.

2. *Trace Metal Detection*.—In *Reid v. State*,⁶⁸ the supreme court held that the results of a trace metal detection test, called TMDT, were properly admitted in evidence.⁶⁹ The test is used to reveal minute traces of metal that remain upon flesh or clothing which has come in contact with a metal object.⁷⁰ Reid, who was charged with murder accomplished with a handgun, objected to the testimony of the police officer who administered the test. The officer's testimony indicated that, on the day of the murder, the defendant's right hand had touched a metal object on the tip of the index finger, on the inside of the middle finger between the second and third joints, between the second and third joints of the little finger,

⁶⁵*Id.* (footnote omitted).

⁶⁶In *Reid v. State*, 259 Ind. 166, 285 N.E.2d 279 (1972), the supreme court stated: In view of the express waiver obtained in appellant's petition for the taking of such a test and in view of the fact he was adequately represented by counsel at the time of such waiver, he cannot now be heard to claim the state violated his right against self-incrimination by the presentation of such evidence.

Id. at 169, 285 N.E.2d at 281. The supreme court also emphasized waiver by the opposing party in *Moore v. State*, 369 N.E.2d 628 (Ind. 1977), in which it wrote: "Absent a waiver or stipulation by the opposing party, references by witnesses or counsel to the results or administration of polygraph tests, direct or indirect are inadmissible . . ." *Id.* at 630.

⁶⁷373 N.E.2d at 915.

⁶⁸372 N.E.2d 1149 (Ind. 1978).

⁶⁹*Id.* at 1152.

⁷⁰*Id.* at 1151.

and in a half inch strip upon the palm: a configuration coinciding with the use of a handgun. Defendant's appeal, based upon the alleged unreliability of the TMDT was rejected by the *Reid* court which stated: "The TMDT, we believe, is generally recognized as reliable, and the defendant has cited us to no case wherein it has been rejected. We see no reason for rejecting evidence adduced by any scientific testing simply because it is subject to error if not properly conducted."⁷¹

A concurring opinion found the admission of the police officer's testimony was harmless error.⁷² Distinguishing its opinion from the *Reid* decision, it criticized the majority for permitting the use of the TMDT without a demonstration, to the satisfaction of the court, that the newly developed test produces reliable results which can be correctly interpreted by a trained technician.⁷³ The police officer who administered the test simply followed the manufacturer's instructions, but did not know why the test worked. Therefore, the concurring opinion found: "[I]t is error to permit the technician to state a conclusion from some manufacturer's manual."⁷⁴

It would appear that the concurring opinion's criticism is unwarranted. Although the police officer did not understand the scientific basis for the test, he had conducted the test on fifteen occasions. He had also attended a seminar presented by the test's manufacturer and was familiar with the directions for performing the test. This background was sufficient for the court to determine that the police officer was an "expert witness."⁷⁵ In determining the admissibility of the test itself, the court could properly consider hearsay evidence, such as the manufacturer's manual.⁷⁶ Absent any evidence by the appellant that the test was not generally reliable, the evidence was sufficient to support the trial court's determination that the evidence was admissible.⁷⁷

⁷¹*Id.* at 1152.

⁷²*Id.* at 1156 (DeBruler, J., concurring).

⁷³*Id.* (DeBruler, J., concurring).

⁷⁴*Id.* at 1156 (DeBruler, J., concurring).

⁷⁵Generally a court's determination of whether or not a witness is an "expert" is a matter for the trial judge's discretion. *Illinois Steel Co. v. Fuller*, 216 Ind. 180, 189, 23 N.E.2d 259, 263 (1939); *Parker v. State*, 136 Ind. 284, 288, 35 N.E. 1105, 1106 (1894); *City of Bloomington v. Holt*, 361 N.E.2d 1211, 1220 (Ind. Ct. App. 1977). See generally MCCORMICK, *supra* note 14, § 13, at 29.

FED. R. EVID. 702 speaks of "a witness qualified as an expert by knowledge, skill, experience, training, or education . . ." The advisory committee's note to rule 702 indicates that the scope of the rule embraces not only experts in the strictest sense of the word, e.g., physicists, physicians, and engineers, but also "skilled" witnesses. The police officer in *Reid* would properly be classified as a "skilled" witness.

⁷⁶See *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 777 (1961); FED. R. EVID. 104(a).

⁷⁷Although many different standards have been applied by courts in determining the admissibility of scientific tests, the most commonly applied standard is "general ac-

F. Impeachment

1. *Prior Convictions.*—An armed robber found his appeal denied as the court of appeals en banc, in *Adams v. State*,⁷⁸ held that assault and battery with intent to commit robbery (a felony) is a crime of "dishonesty."⁷⁹ The issue arose when appellant elected to testify and on cross-examination was questioned, over objection, concerning his conviction two years earlier. As the court recognized, the issue is one of balancing the prejudice to a defendant from the danger that a jury might convict him because of his prior offense, against the degree of reasonableness of inferring present untruthfulness from his prior criminal conduct:

The inference of present untruth is most apparent where an element of the prior offense was also untruthfulness. The inference is less compelling when phrased "because the defendant has demonstrated dishonesty before, he is being untruthful now." It is least compelling when phrased, "because the defendant has previously violated a criminal statute he is being untruthful now."⁸⁰

Although stating the correct standard, the court did not apply the standard correctly. Instead, it looked to three earlier cases and mechanically applied their holdings.

In the landmark decision in *Ashton v. Anderson*,⁸¹ the supreme court held that mere conviction of a criminal offense, without regard to the nature of the crime, was not sufficiently relevant to be used for impeachment.⁸² *Ashton* created two basic categories of prior offenses admissible for impeachment. The first consisted of the modern counterparts to crimes which rendered a witness incompetent at common law.⁸³ The second category consisted of crimes of "dishonesty or false statement."⁸⁴ In *Mayes v. State*,⁸⁵ the court of appeals, applying the language in *Ashton*, held that the intent necessary to commit robbery included that necessary for theft, and that assault and battery with intent to commit robbery required

ceptance" used in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). See MCCORMICK, *supra* note 14, § 203, at 488-91.

⁷⁸366 N.E.2d 692 (Ind. Ct. App. 1977).

⁷⁹See *id.* at 694.

⁸⁰*Id.*

⁸¹258 Ind. 51, 279 N.E.2d 210 (1972).

⁸²*Id.* at 60-61, 279 N.E.2d at 215.

⁸³The prior crimes which rendered a witness incompetent were treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and willful and corrupt perjury. *Id.* at 55-56, 279 N.E.2d at 212-13.

⁸⁴*Id.* at 62, 279 N.E.2d at 217.

⁸⁵162 Ind. App. 186, 318 N.E.2d 811 (1974).

proof of that same intent.⁸⁶ As the court in *Mayes* viewed theft as a crime involving dishonesty, it held that a conviction for assault and battery with intent to commit robbery was admissible for purposes of impeachment.⁸⁷ After *Mayes*, the supreme court, in *Fletcher v. State*,⁸⁸ agreed that a prior conviction for theft was usually proper impeachment evidence.

Although the holdings in *Mayes* and *Fletcher* would appear to require a similar result in *Adams*, a different ruling was possible. In *Mayes*, the defendant was charged with heroin possession, and in *Fletcher*, with commission of a felony while armed (robbery). In each case the evidence used for impeachment was not of a crime so similar to the one charged as to increase the possibility of improper use by the jury. If the question is one of balancing prejudice against probative value, the nature of the offense charged must be considered for a proper balancing of the scale.⁸⁹

In *Adams*, the defendant was charged with armed robbery. A jury, hearing of his earlier conviction for assault and battery with intent to commit robbery, would be tempted to conclude that although the defendant was not successful in his attempt the previous time, he was successful in the case at hand. As noted in the opinion, the evidence was close because there was no evidence of retrieved fruits of the crime, paraphernalia used in its commission, or of apprehension near the scene linking him to the offense.⁹⁰ His conviction rested solely upon eyewitness testimony.⁹¹

In determining whether or not to permit impeachment under such circumstances, the most important single factor is the need for defendant's testimony.⁹² Although a criminal defendant has a con-

⁸⁶*Id.* at 205, 318 N.E.2d at 822.

⁸⁷*Id.*

⁸⁸264 Ind. 132, 340 N.E.2d 771 (1976). In *Fletcher* the court was faced with a conviction under the Offenses Against Property Act, IND. CODE §§ 35-17-5-1 to 14 (1976). Conduct which would sustain a conviction for theft would previously have sustained a conviction for any one of several offenses, including larceny by trick and blackmail. The court rejected as too cumbersome any procedure which would require the trial judge to study the record of the witness' prior conviction to determine the common law equivalent. It left open, however, the possibility that evidence could be presented by opposing counsel at a motion in limine to show the prior offense did not indicate a lack of veracity. See Marple, *Evidence, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 235, 237 (1976).

⁸⁹Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968); United States v. Bailey, 426 F.2d 1236 (D.C. Cir. 1970).

⁹⁰366 N.E.2d at 693.

⁹¹*Id.*

⁹²"One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." 383 F.2d at 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). See generally 3 J. WEINSTEIN, *supra* note 38, ¶ 609[3], at 609-62 to 609-80.4.

stitutional right not to take the stand in his own behalf, in weighing the matter, one must consider that if he does take the stand, a prior criminal record may be revealed for purposes of impeachment. Where the crime charged is very similar to his prior convictions, the defendant may well fear that the jury will believe that since he did it before, he did it again.

When the prior conviction is for an offense denoting dishonesty, the inference of present untruthfulness is "less compelling."⁹³ In these cases a balance needs to be struck between the need for the accused's testimony and its possible misuse, with the scale tipping in favor of the defendant if the prior convictions are for offenses similar to the one charged. The evidence of prior crimes involving dishonesty would only become inadmissible for impeachment if the testimony of the accused was absolutely necessary to the defense, and a prior conviction was for an attempt to commit that offense, or for the same crime as that presently on trial. In *Adams*, the court of appeals could have weighed the necessity for the defendant's testimony together with the increased possibility of prejudice arising from the similarity of the prior conviction to the offense presently charged, against the "less compelling" inference of present dishonesty arising from the prior conviction.

2. *Prior Police Reports.*—The difference between intrinsic and extrinsic impeachment⁹⁴ is highlighted in *Stewart v. State*.⁹⁵ Appellant, who was convicted of assault and battery with intent to commit a felony, assigned as error the refusal of the trial court to permit his eliciting testimony that the prosecuting witness had made false police reports on prior occasions. His offer of proof indicated that a police officer would testify that the prosecuting witness had filed a crime report on November 18, 1974, stating that she had been kidnapped. Another person subsequently reported to the police that the witness had not been kidnapped. No arrests resulted from the investigation. As the evidence offered would not have proven the prior police report to be false, the testimony was properly excluded.⁹⁶

⁹³366 N.E.2d at 694.

⁹⁴Intrinsic impeachment consists of information received from the witness himself, usually during cross-examination. Extrinsic impeachment consists of evidence, other than that obtained during cross-examination, offered solely for purposes of impeachment. Generally, evidence of conduct, other than a conviction, of a witness introduced solely to show he is unworthy of belief due to bad moral character is considered collateral and may not be proved by extrinsic evidence. *People v. Rosenthal*, 289 N.Y. 482, 46 N.E.2d 895 (1943); FED. R. EVID. 608(b). Unlike the federal rule, Indiana law does not permit questions concerning prior misconduct, other than convictions, if the sole purpose is to discredit the defendant as a witness. *Henderson v. State*, 259 Ind. 248, 286 N.E.2d 398 (1972); *Hensley v. State*, 256 Ind. 258, 268 N.E.2d 90 (1971).

⁹⁵368 N.E.2d 253 (Ind. Ct. App. 1977).

⁹⁶*Id.* at 256.

The decision of the court was correct. Issues raised by evidence of possibly false police reports, unlike evidence of false police reports, would require the court to permit the state to introduce evidence that the prior reports were true in an attempt to rehabilitate the witness. This could draw the attention of the court, from the matter before it, to an alleged offense occurring years before the trial. The waste of time and confusion generated by such a collateral issue justifies the court's reluctance to permit the testimony. In such a situation, the defendant, at most, should be permitted to cross-examine the prosecuting witness concerning the prior police reports and their possible fabrication. The defendant should, however, be bound by the witness' answer. Appellant's attempt to use extrinsic evidence to attack the credibility of a witness was properly denied as the evidence offered was at best ambiguous and raised too many collateral issues.⁹⁷

G. Scope of Cross-Examination

The Indiana Court of Appeals, in *Gunn v. State*,⁹⁸ held that a criminal defendant must be permitted to establish the foundation necessary to obtain copies of witness statements and grand jury proceedings during cross-examination.⁹⁹ In order to obtain statements, the required foundation is laid if:

- (1) The witness whose statement is sought has testified on direct examination; (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) The statements relate to matters covered in the witness' testimony in the present case.¹⁰⁰

The trial court in *Gunn* upheld the state's objection that questions by the defense seeking to lay the necessary foundation were beyond the scope of direct and, therefore, improper.¹⁰¹ The *Gunn* court found an abuse of discretion in prohibiting questions aimed at satisfying the second and third of the above-mentioned foundation re-

⁹⁷Evidence of facts showing bias, interest, conviction of a crime, and want of capacity or opportunity for knowledge is not considered collateral and may be proved by extrinsic evidence. The evidence of possibly false prior police reports submitted by the defendant Stewart was offered solely to show that a witness was unworthy of belief because of prior misconduct. Such facts are considered collateral and may not be proved by extrinsic evidence. MCCORMICK, *supra* note 14, §47, at 97-100.

⁹⁸365 N.E.2d 1234 (Ind. Ct. App. 1977).

⁹⁹*Id.* at 1240.

¹⁰⁰*Antrobus v. State*, 253 Ind. 420, 427, 254 N.E.2d 873, 876-77 (1970).

¹⁰¹365 N.E.2d at 1241.

quirements.¹⁰² Any other holding by the court would have created a situation in which the defendant often could not lay an adequate foundation for discovery of prior statements by a witness until after the state had rested, and the defense could recall the witness during the presentation of the defense case. Any documents obtained at that point would no longer be of use in cross-examination, as the defense would have already had its opportunity to cross-examine prosecution witnesses.

XI. Labor Law

*Edward P. Archer**

A. Public Law 254—Public Employees

The only Indiana Supreme Court labor law case during the survey period had a significant impact on Indiana labor relations. In *Indiana Education Employment Relations Board v. Benton Community School Corp.*,¹ the court held Public Law 254,² which provided for collective bargaining between most public employees³ and their governmental employer, to be in violation of article 1, section 12 of the Indiana Constitution⁴ because the statute prohibited judicial review of Indiana Education Employment Relations Board (EERB) pre-election decisions. Section 8(g) of the law authorized judicial review for any "person aggrieved" by any "final order" of the EERB.⁵ Sections 8(d)⁶ and 8(i)⁷ of the statute, however, specifical-

¹⁰²*Id.*

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¹365 N.E.2d 752 (Ind. 1977).

²IND. CODE §§ 22-6-4-1 to 13 (1976).

³Public Law 254 applied to all public employees except policemen, firemen, professional engineers, faculty members of any university, certified employees of school corporations, confidential employees, or municipal or county health care institution employees. IND. CODE § 22-6-4-1(c) (1976). Public school teachers may organize under Public Law 217. IND. CODE §§ 20-7.5-1-1 to 14 (1976).

⁴IND. CONST. art. I, § 12.

⁵IND. CODE § 22-6-4-8(g) (1976).

⁶*Id.* § 22-6-4-8(d) provides in pertinent part, in an action by the Board for enforcement of its award: "[T]he determination by the board that an employee organization has been chosen by a majority of the employees in an appropriate unit may not be subject to review by the court."

⁷*Id.* § 22-6-4-8(i) provides:

In any proceeding for enforcement or review, of a board order held pursuant to section 8 (d) or (g) of this chapter, evidence introduced during the

ly excluded from court consideration or review the EERB's determination of employee organization majority in an appropriate unit.

The court rejected the EERB's argument that such representation questions were reviewable, as are other administrative agency actions, under the Administrative Adjudication Act.⁸ The court observed that Public Law 254 was derived in large part from the National Labor Relations Act (NLRA).⁹ Under the NLRA, the National Labor Relations Board (NLRB) makes preliminary representation question determinations and, if it finds that a question of representation exists, orders an election.¹⁰ The court stated:

If an election is held under the NLRA or Public Law 254, the Board then certifies the results. If the union loses the election, the unit determination made previously by the Board becomes a moot issue. If the union wins the election, upon certification by the Board, the employer is under an obligation to bargain with the certified exclusive representative, which obligation is enforceable through the unfair labor practice complaint procedure.¹¹

The court observed that, under the NLRA, an employer could contest the NLRB unit determination by the unfair labor practice procedure, but sections 8(d) and 8(i) of the Indiana law prohibit judicial review of EERB unit determinations.¹²

The court noted that one of the purposes of the NLRA procedure was to eliminate delaying tactics by an employer during the election procedure and concluded that, because the NLRA was a model for the Indiana statute: “[T]he Legislature believed that if it prohibited review of representation proceedings as a part of the unfair labor practice procedure, no judicial review of § 7 proceedings would be available under any circumstances.”¹³ The court stated that use of Administrative Adjudication Act procedures to provide review of representation questions would create the precise situation sought to be avoided by the NLRA and argued additionally that such representation questions were not “final” administrative orders as would be ripe for review under the Administrative Adjudication Act.¹⁴ In support of its argument that representation decisions and

representation proceeding pursuant to section 7 of this chapter shall not be included in the transcript of the record required to be filed under subsection 8 (d) and (g); nor shall the court consider the record of such proceeding.

⁸365 N.E.2d at 756 (discussing IND. CODE §§ 4-22-1-1 to 14 (1976)).

⁹365 N.E.2d at 756 (discussing 29 U.S.C. §§ 151-169 (1976)).

¹⁰29 U.S.C. § 159(c) (1976).

¹¹365 N.E.2d at 756-57.

¹²Id. at 757.

¹³Id. at 758.

¹⁴Id. at 758-59.

certifications of the EERB are only interim orders, the court again asserted that "the unit determination becomes a moot issue if the union loses the election."¹⁵ The court concluded that only an order to bargain is a final order and that such orders would be reviewable under section 8(g). Finally, the court noted that in similar legislation, providing for bargaining between school boards and certified school employees,¹⁶ the legislature specified that appeals could be taken under the Administrative Adjudication Act, and that no such provision was contained in Public Law 254. The court thus concluded that the constitutional requirement for judicial review of agency action set forth in *Warren v. Indiana Telephone Co.*¹⁷ was not met.¹⁸

The court rejected the EERB's argument that the objectionable portions of section 8 were severable from the rest of the statute. It stated: "[T]he ultimate test is whether or not the Legislature would have passed the statute had it been presented without the invalid features"¹⁹ and concluded: "[B]ecause the objectional prohibitions on judicial review . . . are so unique and shape the fundamental character of Indiana's public employee bargaining statute, they are not severable from the remainder of the Act, and the entire statute must be voided."²⁰

The impact of this decision on collective bargaining for Indiana public employees is, of course, devastating. Only public school teachers continue to have the right to bargain collectively in Indiana.²¹ The only channel available for reconstruction of public employee bargaining rights is the legislature. In that regard, it is important that the lessons of *Benton Community School* be learned in order to avoid a similar pitfall in future legislation.

The court clearly required that, to meet Indiana constitutional requirements, judicial review must be provided for administrative determinations regarding election issues. The court also implied that this requirement would be met if review were provided through an unfair labor practice procedure as under the NLRA.

This implication, however, may be fraught with hazards. The court stated that if the union loses the election the earlier resolution of representation questions becomes moot. This statement may be true from the employer's perspective, but it clearly is not true from

¹⁵*Id.* at 759.

¹⁶IND. CODE § 20-7.5-1-6 (1976).

¹⁷217 Ind. 93, 26 N.E.2d 399 (1940).

¹⁸365 N.E.2d at 760. In *Warren*, the supreme court held that the due process clause requires that the actions and orders of an administrative body be subject to judicial review. 217 Ind. at 104-05, 26 N.E.2d at 404.

¹⁹365 N.E.2d at 760.

²⁰*Id.* at 761.

²¹See IND. CODE §§ 20-7.5-1-1 to 14 (1976).

the union's perspective. For example, if the EERB were to reject a union's petition for a smaller unit, the union's loss of an election in the larger unit would not moot its original contention that the smaller unit would have been appropriate. Under the NLRA, no judicial review is available to unions under these circumstances.²² If the NLRA system of review is adopted in its entirety, the contention could again be made that the Indiana constitutional requirement that judicial review be available for all agency determinations is not fulfilled.

Regarding the merits of the court's decision, the dissenting opinion is much more persuasive. The dissent concluded that the objectionable portions of the statute were severable from the remainder of the law and, thus, did not render the entire statute invalid.²³ To find the pertinent provisions of section 8(d) and 8(i) inoperative and to sustain the remainder of Public Law 254 would preserve its primary purpose—to provide for collective bargaining between public employers and employees. The statute established rights of employers and employees, set forth unfair labor practice limitations on conduct of both employers and employee organizations, set forth procedures for determining the representation status of employee organizations, and established an entire system to administer those provisions. Clearly, the limitation on judicial review of pre-election determinations is not the heart of the law. The court's conclusion that the legislature would not have passed the statute if it had been presented without the limitations on judicial review of the EERB's election determinations is totally unconvincing.

B. Public Law 217—Public School Teachers

Several court of appeals decisions relating to various facets of labor law were issued during the survey period. After the supreme court found Public Law 254 to be unconstitutional and void in *Benton Community School*, the only statutory protection remaining for public employee bargaining in Indiana was Public Law 217²⁴ which applies to public school teachers.

That statute was very strictly construed in *Indiana Education Employment Relations Board v. Board of School Trustees*.²⁵ The court of appeals held that, under the facts of that case, the president of the bargaining representative for the teachers was not engaged in protected activity in representing a teacher whose contract

²²See, e.g., NLRB v. Falk Corp., 308 U.S. 453 (1940); AFL v. NLRB, 308 U.S. 401 (1940).

²³365 N.E.2d at 762.

²⁴IND. CODE §§ 20-7.5-1-1 to 14 (1976).

²⁵368 N.E.2d 1163 (Ind. Ct. App. 1977).

renewal was in jeopardy.²⁶ The court, accordingly, concluded that the EERB had erred in finding that the school board's dismissal of the president, a non-tenured teacher, for his representation of this teacher was an unfair labor practice.²⁷ The court concluded that section 6 of the law²⁸ "allows school employees to engage in only those activities which attempt to advance the rights of the teachers in the bargaining unit as a group, and confers no right upon a school employee to discuss a personal grievance with his school employer."²⁹

The court recognized that section 2(o)³⁰ provides a means of recourse for a teacher who has an individual grievance. That section specifically provides: "Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of his grievances either individually or through the exclusive representative . . .".³¹ The court concluded,

²⁶368 N.E.2d at 1167.

²⁷*Id.*

²⁸IND. CODE § 20-7.5-1-6 (1976) provides:

(a) School employees shall have the right to form, join or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits and other matters as defined in sections 4 and 5.

Section 4 provides:

A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Id. § 20-7.5-1-4. Section 5 provides:

(a) A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Section 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, that any items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.

(b) Nothing shall prevent a superintendent or his designee from making recommendations to the school employer.

Id. § 20-7.5-1-5.

²⁹368 N.E.2d at 1168.

³⁰IND. CODE § 20-7.5-1-2(o) (1976).

³¹*Id.*

however, that this section was not applicable because the teacher whose contract was in jeopardy did not petition his school employer, governing body, or superintendent for redress of his personal grievances.³² The court stated in dictum that discharge of an employee representative for assisting a school employee in furtherance of his rights under section 2(o) would be an unfair labor practice.³³

In addition, the court addressed the question of the fact-finding authority of the EERB. The trial court had held that the school board's determination not to renew a teacher's contract was "final and conclusive" and not reversible by the EERB "unless no evidence exists to support the reasons given by the School Board for non-renewal, or unless the reasons given were a sham and the School Board is found to have acted in bad faith, corruptly, fraudulently, or to have grossly abused its discretion."³⁴ The trial court had analogized the EERB review of the school board decision to court review of an administrative decision under the Administrative Adjudication Act.³⁵ The court rejected this holding of the trial court, stating that the function of the EERB is to conduct *de novo* proceedings to resolve unfair labor practice complaints and that the trial court's function is one of review within the meaning of the Administrative Adjudication Act.³⁶

The court's holding on the issue of the discharge of the bargaining representative president is very narrow. Had the teacher, whose contract renewal was in jeopardy, petitioned the school employer for redress within the meaning of section 2(o), the bargaining representative president would have been protected in assisting him in furtherance of his petition. This holding clearly exalts form over substance. The bargaining representative president had been asked by the teacher to help him retain his position. The teacher had been asked to resign. The bargaining representative president had contacted the parents of some of the teacher's students and asked them to call the school board, and he had accompanied the teacher to a conference with the high school principal who had sought the teacher's resignation. While apparently no formal petition had been filed for redress of the teacher's concern about his non-renewal, clearly the teacher had evidenced his concern to the school principal. Discussions with the principal, both with and without the presence of the representative president, were aimed at seeking redress of the teacher's grievance or concern about non-renewal. The court's

³²368 N.E.2d at 1168.

³³*Id.*

³⁴*Id.* at 1170.

³⁵IND. CODE § 4-22-1-18 (1976).

³⁶368 N.E.2d at 1168.

holding that such efforts to resolve individual grievances prior to the filing of a formal petition are not protected activities will surely formalize and, therefore, rigidify procedures in school labor relations.

Moreover, this undesirable end result seems totally unnecessary. The statute does not define either "petition" or "petitioning." A more reasonable construction of section 2(o) would be to treat preliminary settlement efforts before the filing of a written grievance as being equivalent to "petitioning the school employer . . ." for a redress.³⁷

Nor is there any convincing support for the court's conclusion that section 6 confers no right upon a school employee to discuss a personal grievance with his school employer. Section 6 specifically states that school employees have the right "to engage in other activities, individually or *in concert* for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits . . ."³⁸ Surely the actions of the teacher and the bargaining representative president in this case were actions in concert for the purpose of maintaining the teacher's employment contract which covered all of the items specifically listed in section 6.

Section 6 is far more specific with respect to protecting the employee's right to discuss personal grievances, individually or in concert, than is the language of section 7 of the NLRA³⁹ after which it was patterned. The Indiana Supreme Court in *Benton Community School* recognized the influence of the NLRA as the pattern for Public Law 254.⁴⁰ The NLRA likewise set the pattern for teacher bargaining rights granted in Public Law 217. Section 7 of the NLRA provides that "employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."⁴¹ Under this far more general language, it has long been accepted that union representatives are protected when representing employees in pre-grievance procedures. In *NLRB v. Weingarten, Inc.*,⁴² the Supreme Court upheld the NLRB's interpretation of this language as affording an employee the right to have a union representative at any confrontation with his employer when the employee reasonably believes the investigation will result

³⁷IND. CODE § 20-7.5-1-2(o) (1976). By construing this section to require the filing of a formal written document despite the fact that the school board has been given actual notice, the court is placing form over substance.

³⁸*Id.* § 20-7.5-1-6 (emphasis added).

³⁹29 U.S.C. § 157 (1976).

⁴⁰See note 9 *supra* and accompanying text.

⁴¹29 U.S.C. § 157 (1976).

⁴²420 U.S. 251 (1975).

in disciplinary action.⁴³ In the companion case, *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*,⁴⁴ the Supreme Court upheld the NLRB's reinstatement with back pay of a union representative who was discharged for insisting upon her right to represent an employee at an investigatory interview.⁴⁵

The language of section 6 of Public Law 217 is more specific in protecting the employees' right to be represented than section 7 of the NLRA. Also, the additional language of section 2(o) of Public Law 217, for which there is no direct counterpart in the NLRA, clearly establishes the right of school employees to redress grievances either individually or through their exclusive representatives.⁴⁶ Moreover, such a right is essential to good labor relations. As the Supreme Court noted in *Weingarten*:

The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer presentation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.⁴⁷

Despite its unreasonable construction of section 6 and section 2(o), the court performed a service in clarifying the trial court's

⁴³*Id.* at 267.

⁴⁴420 U.S. 276 (1975).

⁴⁵*Id.* at 277.

⁴⁶See text accompanying note 31 *supra*.

⁴⁷420 U.S. at 262-64 (citations omitted).

misunderstanding of the fact-finding role of the EERB. Clearly, the EERB was intended to have authority to hear unfair labor practice issues *de novo*. The trial court's version of the EERB's role would place the respondent school corporation in the position of being both the trier of fact and the respondent. Certainly the legislature could not have intended that the respondent have authority to decide its own case subject only to a very limited review.

C. Public Employees under Civil Service Acts

The court of appeals decision in *Grenchik v. State ex rel. Pavlo*⁴⁸ will put substantial pressure on cities to comply with legislative requirements to establish civil service systems.

Effective January 21, 1972, Indiana Code section 19-1-37.5-1⁴⁹ mandated the City of Whiting to create a civil service system for firemen. Under the statute the civil service system was to be administered by a three person commission. Upon adoption, full-time firemen were to become permanent members of the civil service system. Permanent members were to be subject to demotion for violation of written rules of the commission, and any demotions were to be subject to a review procedure before the commission.⁵⁰ Despite this statutory requirement, four years later, when the firemen in this case were demoted, the City had not adopted a civil service system for firemen. The court upheld the trial court order that two firemen, who were demoted for political reasons, be reinstated to their former positions with back pay.⁵¹

The court rejected the City's argument that this statute was a nullity until the City established a civil service commission for firemen. Citing authority from Indiana⁵² and from other jurisdictions,⁵³ the court held that the firemen were demoted in violation of the statute and were entitled to reinstatement.⁵⁴ The court noted that the statute was intended to protect firemen from arbitrary political actions and that, when the City failed to create the mandated civil service commission, no governmental body existed with the power to demote the firemen in accordance with the statute.⁵⁵

⁴⁸373 N.E.2d 189 (Ind. Ct. App. 1978).

⁴⁹IND. CODE § 19-1-37.5-1 (1976).

⁵⁰*Id.* §§ 19-1-37.5-6, -7.

⁵¹373 N.E.2d at 192.

⁵²*Hauser v. Town of Highland*, 237 Ind. 516, 147 N.E.2d 221 (1958); *City of Frankfort v. Easterly*, 221 Ind. 268, 46 N.E.2d 817 (1943).

⁵³*Simpson v. City of Grand Island*, 166 Neb. 393, 89 N.W.2d 117 (1958); *Myers v. Board of Directors Tualatin Rural Fire Dist.*, 5 Or. App. 142, 483 P.2d 95 (1971); *Logan v. City of Two Rivers*, 222 Wis. 89, 267 N.W. 36 (1936).

⁵⁴373 N.E.2d at 192.

⁵⁵*Id.*

The court also noted that the statute provided that reinstatement entitled a party to compensation from the time of demotion.⁵⁸

The court also rejected the City's argument that the fire department's failure to elect a commissioner under the statute constituted either a waiver or a basis for estoppel to bar the firemen from reinstatement and back pay. The court noted that the City had failed to show that the demoted firemen had intended to forfeit their rights under the statute and concluded: "The Act placed no duty on individual firemen to take the City of Whiting to court to mandate creation of a commission. Instead the Act mandated the City to implement the Act."⁵⁹

This decision is well reasoned and based upon substantial precedent.⁶⁰ It clearly gives considerable impetus to cities to follow legislative mandates to create civil service commissions. When cities attempt to circumvent such a mandate by failing to create a commission, they will be unable to take any action against employees if their action would be subject to administration by such a commission.⁶¹

D. Labor Employment Security Act

Two significant cases involving the administration of the Employment Security Act⁶² were decided by the court of appeals.

In *Hoosier Wire Die, Inc. v. Review Board of Indiana Employment Security Division*,⁶³ the court reversed the Division Review Board's determination that an NLRB back pay award could be deductible income only in the week it was received by the claimant.

The NLRB had ordered that an employee be reinstated and made whole for any loss of pay. As is its practice, the NLRB computed the back pay on a quarterly basis for the period between the employee's termination of employment and his reinstatement.⁶⁴ For almost all of that period, the employee had collected unemployment compensation benefits. After making payment to the employee under the NLRB order, the company requested that its experience account be relieved of charges for the benefit overpayment for the period covered by the payment. The referee ruled that under the

⁵⁸*Id.*

⁵⁹*Id.* at 193.

⁶⁰See authorities cited in notes 52 & 53 *supra*.

⁶¹Under the statute in question no firemen could be removed, suspended, demoted, or discharged. IND. CODE § 19-1-37.5-7 (1976).

⁶²IND. CODE § 22-4-1-1 (1976).

⁶³370 N.E.2d 1343 (Ind. Ct. App. 1978).

⁶⁴See *ISIS Plumbing & Heating Co.*, 138 N.L.R.B. 716 (1962); *F.W. Woolworth Co.*, 90 N.L.R.B. 289 (1950).

Employment Security Act the employee received deductible income only within the calendar week during which she actually received payment.

The Employment Security Act provides that an employee must repay benefits to which he is not entitled because of subsequent receipt of income deductible from benefits which is allocable to the week or weeks for which such benefits were paid.⁶³ It also provides: “[W]here it is finally determined . . . that an individual has received benefits to which he is not entitled under this article, the board . . . shall relieve the affected employer's experience account of any benefit charges directly resulting from such overpayment.”⁶⁴ The statute lists an NLRB award of back pay as a deductible income item:

Provided, however, That if such payments made pursuant to the provisions of the National Labor Relations Act . . . are not, by the terms of the order or agreement under which said payments are made, allocated to any designated week or weeks, then, and in such cases, such payments shall be considered as deductible income in and with respect to the week in which the same is actually paid.⁶⁵

The Division Review Board contended: (1) Because the NLRB computed its award on a quarterly basis, no allocation to designated weeks had been provided, and (2) a designated amount must be assigned to a designated week before an award becomes deductible.

The court rejected that argument and held that the employee received payment for the weeks covered by the NLRB award in the form of back pay ordered by the NLRB.⁶⁶ It held that the computations provided by the NLRB were deemed to be a part of its order and that the requirement that the award be allocated to a designated week or weeks is satisfied when the order provides sufficient information to reveal to the Division Review Board that the claimant has received his wages for the period during which he also received unemployment benefits.⁶⁷

The court's construction of the statute seems quite reasonable. In light of the NLRB's long followed practice of computing back pay on a quarterly basis, to adopt the Review Board's position would defeat the legislature's intent that NLRB back pay awards be treated as a deductible item requiring repayment by the claimant and credit to the employer's experience account.

⁶³IND. CODE § 22-4-13-1(b) (1976).

⁶⁴*Id.* § 22-4-13-1(d).

⁶⁵*Id.* § 22-4-5-2.

⁶⁶370 N.E.2d at 1348.

⁶⁷*Id.* at 1349.

The court was not asked to address the situation which can result from attempting to allocate an NLRB back pay award to designated weeks within the period covered by the award when an employee has no job for the first portion of a quarter, but obtains a job paying much more than his former job for the last portion of the quarter. To illustrate, if the employee would have earned \$1,000 per month in his job with the employer and he is unemployed for the first two and one-half months of a quarter, but employed elsewhere at \$3,000 per month for the last one-half month of the quarter, the NLRB award for the quarter would be the \$3,000 he would have earned with the employer less the \$1,500 he earned in his new job or \$1,500. Since the greatly increased income in the latter portion of the quarter offsets a portion of the back pay which would have been due for the first two and one-half months of the quarter, it is not clear how the \$1,500 payment should be allocated within that two and one-half month period. It could be argued that under the controlling statute⁶⁸ this \$1,500 payment should be considered as deductible income for the week in which it is actually paid. Such an approach, however, would clearly defeat the legislative intent to treat NLRB awards as deductible income because such awards are almost always paid after the employee is reinstated, and, thus, at a time when the employee is no longer claiming unemployment benefits. The statute provides that to avoid allocating the payment to the week in which it was actually paid the payment must be "allocated to any designated week or weeks."⁶⁹ Under the above example, the \$1,500 payment for the quarter clearly is allocable to the weeks within the first two and one-half months of the quarter and should be considered as deductible income in those weeks. Because the statute includes, as an alternative allocation to a designated week, the allocation to "designated weeks," the fact that the payment cannot be allocated to specific weeks should not defeat its treatment as deductible income throughout the two and one-half month period.

The court's decision in *Hoosier Wire* is consistent with this illustration. The court stated: "[T]he requirement that an award be allocated to a *designated week or weeks* is satisfied when the Order provides sufficient information to reveal to the Division that the claimant has received his wages for *the period* during which he also received unemployment compensation benefits."⁷⁰

The second significant case interpreting the Employment Security Act decided by the court of appeals was *Wilson v. Review Board of*

⁶⁸IND. CODE § 22-4-5-2 (1976).

⁶⁹*Id.* (emphasis added).

⁷⁰370 N.E.2d at 1349 (emphasis added).

*the Indiana Employment Security Division.*⁷¹ In that case, the claimant's unemployment compensation benefits had been terminated by the Division after a determination by the deputy based upon the former employer's report that she had refused an offer of suitable work. The claimant brought this action in the trial court contending that the Division's termination of her benefits without notice and without affording her a hearing was in violation of her right to due process⁷² and due course of law.⁷³ The court, relying heavily on *Mathews v. Eldridge*,⁷⁴ held that unemployment benefits constitute a property interest protected by the requirements of due process.⁷⁵ The court concluded, therefore, that the Division's suspension and termination process denied insured workers due process by suspending or terminating benefits without providing the insured worker adequate notice and an opportunity for a hearing at which he could offer evidence or confront adverse witnesses.⁷⁶

The Indiana Employment Security Act was amended in 1972 to provide: "In the event a hearing is requested by an employer or the division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing."⁷⁷ The court held that this language of the Act complied with due process and due course of law requirements, but that the Division had improperly construed the Act in cutting off the claimant's benefits without a due process hearing.⁷⁸

The result of this decision will be to require the Division, when a hearing is requested by a claimant, who was previously found to be eligible for benefits, to continue benefit payments to the claimant until the prior determination of eligibility is reversed at a due process hearing. This result appears consistent with the dictates of prior precedent⁷⁹ and the 1972 amendment to the Act.

⁷¹373 N.E.2d 331 (Ind. Ct. App. 1978). For another discussion of *Wilson*, see Price, *Administrative Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 30, 41-42 (1978).

⁷²U.S. CONST. amend XIV.

⁷³IND. CONST. art. 1, § 12.

⁷⁴424 U.S. 319 (1976).

⁷⁵373 N.E.2d at 340-41.

⁷⁶*Id.* at 341.

⁷⁷Act of Feb. 17, 1972, Pub. L. No. 174, 1972 Ind. Acts 844 (codified at IND. CODE § 22-4-17-2(e) (1976)).

⁷⁸373 N.E.2d at 344. According to the court, a "due process hearing" before the Division requires adequate notice of the hearing and an opportunity to offer evidence and confront adverse witnesses. *Id.* at 341.

⁷⁹See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

E. Workmen's Compensation and Occupational Diseases Act

In *Martinez v. Taylor Forge & Pipe Works*,⁸⁰ the Indiana Court of Appeals upheld an Industrial Board decision that a gradually incurred hearing loss due to a high level of noise at the employees' workplace was neither the result of an accident covered by the Workmen's Compensation Act⁸¹ or an occupational disease covered by the Workmen's Occupational Diseases Act.⁸² The court noted that, to prevail on appeal from a negative decision from the Industrial Board, the claimants must establish "that the decision was contrary to law by showing the evidence was without conflict, that it would lead to but one conclusion, and that the Industrial Board reached the opposite conclusion."⁸³

The parties stipulated: The plaintiffs' loss of hearing could not be traced to one particular incident, that it occurred gradually over a long period of time, that the noise the plaintiffs were exposed to during their working hours was much greater than the noise they were exposed to after their working hours, and that the noise-induced hearing loss of the plaintiffs would not have been unexpected or unforeseen by reasonable men under similar circumstances.

The court concluded that an accident arising out of or in the course of employment had not occurred and that the claimants had not put forth a convincing argument that their hearing loss should be compensable as an occupational disease.⁸⁴ In addition, the court stated that even if an inference were to be made that the hearing loss was an occupational disease, the opposite inference was equally supported by the evidence. The court stated that, in reviewing the Industrial Board decision, it would only consider the evidence "which supports the decision and reasonable inferences therefrom" and concluded that it could not state "that the Board erred as a matter of law in finding that [the claimants] did not sustain hearing loss by reason of contracting an 'occupational disease' within the purview of the Act."⁸⁵ Finally, the court held that the claimants failed to establish a disablement as would justify recovery under the Act because, following the closing of the defendant's plant, they secured employment comparable in both levels of noise and wages to what they had experienced in their prior employment.⁸⁶

⁸⁰368 N.E.2d 1176 (Ind. Ct. App. 1977).

⁸¹See IND. CODE § 22-3-2-2 (1976).

⁸²*Id.* § 22-3-7-2.

⁸³368 N.E.2d at 1177-78.

⁸⁴*Id.* at 1179.

⁸⁵*Id.*

⁸⁶*Id.* at 1180.

The court's reasoning in this case is confusing. From the court's reference to the limited standard of review of administrative agency decisions, it appears that the court considered this issue as a matter of administrative fact finding or, at least, as a matter within the range of broad administrative discretion. The question at issue between the parties was not, however, grounded in a factual dispute. The parties stipulated the facts. The issue presented was a question of law: Did the legislature intend a gradually-incurred industrial hearing loss to be compensable under either the Workman's Compensation Act or the Occupational Disease Act?

This question of law is extremely important and has been the subject of judicial resolution and legislative efforts in several other states over the past few years. Some courts have found gradual loss of hearing to be an accidental injury compensable under Workmen's Compensation Acts.⁸⁷ In *Hinkle v. H.J. Heinz Co.*,⁸⁸ the Supreme Court of Pennsylvania found such a loss of hearing to be the result of an "accident," viewing each outburst of noise as a "miniature accident" and concluding that prolonged exposure to noise was compensable under the Pennsylvania Act.⁸⁹ Other jurisdictions have come to the opposite conclusion.⁹⁰ Professor Larson in his treatise *The Law of Workman's Compensation* notes: "The greatest flurry in the occupational disease field since the recognition of silicosis as a compensable disease in the early 1930's was caused by the partial loss of hearing problem beginning in 1948."⁹¹

The court's conclusion that the claimants in this case had not established a disablement because they had not lost any wages is not a settled point of law. Larson notes that this legal problem dates back to *Slawinski v. J.H. Williams & Co.*,⁹² a New York case which granted a schedule award to a drop forge shop employee for loss of hearing although he had lost no work time and had suffered no loss of earnings. Larson then discusses the subsequent case law develop-

⁸⁷Shipman v. Employers Mut. Liab. Ins. Co., 105 Ga. App. 487, 125 S.E.2d 72 (1962); Winkelman v. Boeing Airplane Co., 166 Kan. 503, 203 P.2d 171 (1949); Skowronski v. Ajax Forging & Casting Co., 54 Mich. App. 136, 220 N.W.2d 725 (1974); Vaughn & Rush v. Stump, 156 Okla. 125, 9 P.2d 764 (1932); Hinkle v. H.J. Heinz Co., 462 Pa. 111, 337 A.2d 907 (1975). See also Lozowski v. Nicholson File Co., 92 R.I. 270, 168 A.2d 143 (1961).

⁸⁸462 Pa. 111, 337 A.2d 907 (1975). *Contra*, Workmen's Compensation Bd. v. Stolsky, 18 Pa. Commw. Ct. 367, 336 A.2d 447 (1975) (lower court decision rendered one month earlier than *Hinkle* and in apparent conflict).

⁸⁹462 Pa. at 117-18, 337 A.2d at 910.

⁹⁰Workmen's Compensation Bd. v. Stolsky, 18 Pa. Commw. Ct. 367, 336 A.2d 447 (1975); Carling v. Industrial Comm'n, 16 Utah 2d 260, 399 P.2d 202 (1965).

⁹¹IB A. LARSON, THE LAW OF WORKMAN'S COMPENSATION § 41.50 (1978).

⁹²298 N.Y. 546, 81 N.E.2d 93 (1948).

ment and legislative efforts in other jurisdictions related to this issue.⁹³

A complete analysis and application of the reasoning underlying this problem to Indiana statutes is beyond the scope of this discussion. Larson's consideration of the issue is noted only to illustrate the significance and complexity of the matter presented to the court. By alluding to the limited standard of review of administrative decisions, the court failed to confront the issue. The court did give the impression that if the Industrial Board were to change its interpretation, at least with respect to the Occupational Diseases Act, to find industrially caused gradual hearing losses to be compensable, the court might sustain that interpretation as well. In the meantime, if this decision is to remain unchanged on further appeal, such hearing losses are not compensable under either the Workmen's Compensation Act or the Occupational Disease Act in Indiana.

XII. Products Liability

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During this survey period few products liability cases were decided under Indiana law,¹ but these few may prove to be highly significant because specific doctrines of Indiana products liability law appear to have been modified or redefined. In addition, the Indiana General Assembly enacted a new products liability statute² which promises to have a major impact on products liability practice in this state.

⁹³IB A. LARSON, *supra* note 91.

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¹Two cases decided during the survey period are not discussed because they either did not raise any new issues or did not discuss issues concerning products liability. See *Cates v. Jolley*, 373 N.E.2d 877 (Ind. 1977) (negligence case involving ladder); *American Home Prod. Corp. v. Vance*, 365 N.E.2d 780 (Ind. Ct. App. 1977) (primarily discussing issue of inconsistent jury verdict).

²Act of Mar. 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE §§ 33-1-1.5-1 to 8 (Supp. 1978)). The full text of this chapter is reprinted as an appendix following this article.

A. Judicial Developments

1. *Assumption of Risk, Misuse, and Contributory Negligence.*—In *Fruehauf Trailer Division v. Thornton*,³ the plaintiff received a jury verdict against the defendant tire manufacturer for injuries sustained when his tire blew out, causing his semi-trailer to overturn and burn. The verdict was affirmed on appeal.⁴ One issue considered was the trial court's refusal to tender instructions concerning misuse and incurred risk. The court of appeals stated that if the plaintiff user has knowledge of the defect, misuse becomes a part of the defense of assumption of risk (incurred risk).⁵ Assumption of risk is, in turn, based upon voluntary consent as tested by a subjective standard.⁶ In contrast, contributory negligence is premised on unreasonable conduct of the plaintiff as tested by an objective standard.⁷ In other words, contributory negligence requires an objective determination that the plaintiff has failed to guard against a known defect when under a duty to do so.

Because there was no evidence that the plaintiff voluntarily drove an excessive distance after the tire blew out, he could not have legally incurred the risk. Although plaintiff presumably had knowledge of the defect *after* the blowout, there was insufficient evidence to conclude that he subjectively determined to continue driving so as to constitute a misuse in the presence of a known defect.⁸ Thus, significantly, the *Thornton* court held that, although an instruction for contributory negligence was given under the negligence count, an instruction for misuse *where the defect is known* is not appropriate under a strict tort count unless sufficient evidence of plaintiff's voluntariness and subjective determination of continuing conduct is presented at trial.⁹

The defense of assumption of risk (incurred risk) was analyzed in an outstanding opinion in *Kroger Co. v. Haun*.¹⁰ *Haun*, a negligence case, thoroughly discussed the difference between contributory negligence and assumption of risk. The *Haun* court observed that strict definitional differences between contributory negligence and assumption of risk might not be important in ordinary negligence actions inasmuch as both are valid defenses, but emphasized that the distinction is important in situations in which assumption of risk is a

³366 N.E.2d 21 (Ind. Ct. App. 1977).

⁴*Id.* at 25.

⁵*Id.* at 29.

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹*Id.* at 29-30.

¹⁰379 N.E.2d 1004 (Ind. Ct. App. 1978).

defense, and contributory negligence is not, such as guest statute cases and strict liability cases.¹¹

Recognizing that some Indiana decisions have repeatedly held that the doctrines of contributory negligence and assumption of risk are separate and distinct, while others have stated that assumption of risk is merely a species of contributory negligence, the *Haun* court allocated these conflicting views to definitional differences.¹² The *Haun* court then redefined both contributory negligence and assumption of risk in their classic senses. Contributory negligence was defined as unreasonable conduct as tested by the objective reasonable person. Assumption of risk was defined as consenting to undertake a risk with actual knowledge, understanding, and appreciation of the risk involved and a voluntariness in accepting that risk.¹³

The *Haun* court said the confusion in distinguishing the two defenses under Indiana law has been in large part due to two factors. First, there has been an infusion of the objective reasonable person test into the assumption of risk concept. Second, Indiana courts have erroneously incorporated the requirements of knowledge and appreciation of a peril into contributory negligence.¹⁴ In *Stallings v. Dick*,¹⁵ for example, the court stated that assumption of risk included the proposition that knowledge of a risk may be imputed if such a risk would have been "readily discernible by a reasonable and prudent man under like or similar circumstances."¹⁶ The *Haun* court, in rejecting this definition, opined that to hold that one may incur a risk of which he had no actual knowledge, yet was required to know in the exercise of ordinary care, is a perversion of the doctrine.¹⁷ The *Haun* court stated that dangers which are so obvious that knowledge of them may be imputed as a matter of law do not constitute assumption of risk, but should be treated as unreasonable conduct in failing to recognize an obvious risk or danger, therefore constituting contributory negligence.¹⁸

¹¹*Id.* at 1013-14 (citing *Ridgeway v. Yenny*, 223 Ind. 16, 57 N.E.2d 581 (1944); *Fruehauf Trailer Div. v. Thornton*, 366 N.E.2d 21 (Ind. Ct. App. 1977); *Gregory v. White Truck & Equip. Co.*, 323 N.E.2d 280 (Ind. Ct. App. 1974) (strict liability); *Collins v. Grabler*, 147 Ind. App. 584, 263 N.E.2d 201 (1970) (guest statute)).

¹²379 N.E.2d at 1008.

¹³*Id.* at 1007.

¹⁴*Id.* at 1008.

¹⁵139 Ind. App. 118, 210 N.E.2d 82 (1965).

¹⁶*Id.* at 129, 210 N.E.2d at 88.

¹⁷379 N.E.2d at 1009.

¹⁸*Id.*

The court then allocated the various types of plaintiff-conduct within the above definitional framework.¹⁹ The court noted that in some situations a plaintiff may expressly or impliedly consent to a risk, thereby eliminating the defendant's duty to protect him from that risk. These situations were characterized as "primary assumption of risk."²⁰ In "primary assumption of risk" cases, the issue of whether the risk was reasonable is not relevant since the defendant owed no duty to the plaintiff. Thus, both assumption of risk and contributory negligence, when used in the "primary" sense, are properly analyzed as a "no duty" concept and not as defenses.²¹

Once the defendant has been charged with a duty, however, any breach of that duty constitutes negligence. Under this situation the defendant may still avoid liability by asserting: (1) The plaintiff came upon a risk created by defendant's negligence, knew of and appreciated its magnitude, but nevertheless accepted it voluntarily; or (2) the plaintiff's conduct failed to conform to that of a reasonable person under the circumstances.²² The former situation is "secondary assumption of risk," while the latter situation is contributory negligence.²³ In certain situations, "secondary assumption of risk" and contributory negligence will "overlap."²⁴ This overlap occurs when the plaintiff's conduct has been voluntary and knowing, as well as unreasonable, in other words, when the plaintiff has incurred an unreasonable risk. In such "overlap" situations, either defense may be asserted.²⁵

The *Haun* court stated that in situations where assumption of risk, but *not* contributory negligence, is available as a defense, the defenses should be analyzed as follows. "While contributory negligence (unreasonable conduct) is *not* a defense in such cases, it may, nevertheless, be present in the form of conduct which includes

¹⁹The *Haun* court listed the following possible situations:

(1) [T]he existence or non-existence of a duty owed by the defendant to plaintiff for the prevention of the danger in question;
(2) the voluntariness of plaintiff's conduct and his knowledge and appreciation of its possible consequences, or lack thereof, and
(3) the reasonableness of the risk entailed or conduct engaged in by the plaintiff.

Id. at 1011.

²⁰*Id.*

²¹*Id.* at 1012.

²²*Id.*

²³*Id.*

²⁴The "overlap" area, wherein both contributory negligence and assumption of risk exist at the same time, is more fully explained in Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447, 451-55 (1978).

²⁵*Id.* at 451.

the additional elements of voluntary and knowing incurrence.”²⁶ Such conduct would be a defense, not because it is unreasonable, but because it constitutes a voluntary assumption of a known risk. The decision is consonant with the *Restatement (Second) of Torts* section 402A, Comment n, which describes only the “overlap” area as a defense to strict liability in tort.²⁷

The decision provides an excellent analysis of contributory negligence and assumption of risk, and clarifies Indiana law concerning the types of defenses available to the defendant in products liability and guest statute cases. However, the question still remains whether the pure type of “secondary assumption of risk,” where the plaintiff *reasonably* assumes the risk, is a defense.²⁸ Although most situations involve the overlap area, it is still theoretically possible that a plaintiff may reasonably assume a risk arising out of defendant’s negligent conduct or defective product, and, in this situation, reasonable assumption of risk has traditionally been considered a defense.²⁹ Recent decisions in other jurisdictions have refuted the use, in some circumstances, of reasonable assumption of risk as a defense on policy and social grounds. For example, in *Blackburn v. Dorta*,³⁰ the Florida Supreme Court theorized the situation in which the plaintiff rushes into a burning building to rescue a child as an example of reasonable assumption of risk.³¹ In this situation the application of the defense of reasonable assumption of risk would bar the plaintiff from recovery. The *Dorta* court found no policy justification for the defense under these circumstances and rejected its use.³² The question of whether there is an area of defense for a reasonable risk incurrence in Indiana, apparently, remains open.

²⁶379 N.E.2d at 1014.

²⁷The RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) states:

Contributory Negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

²⁸See Vargo, *supra* note 24, at 451-60.

²⁹*Id.*

³⁰348 So. 2d 287 (Fla. 1977).

³¹*Id.* at 291.

³²*Id.* at 291-93.

Finally, the *Haun* court, in a limited discussion of the voluntariness element of assumption of risk, implied that a plaintiff in an employment situation, who is following directions as to how he is to fulfill his job requirements, may not always be acting voluntarily.³³ In other words, when a person is required, by an employer or by others, to perform his work in a specified way and whose only choices are to continue to work in the specified manner, to quit his job, or to suffer substantial sanctions from his employer, there is a question whether there is really any choice at all. Other jurisdictions, when faced with this issue, have determined that no true choice is presented and that, consequently, the employee did not incur the risk.³⁴ As one court explained: "'[I]t was 'his poverty, not his will,' that made him consent.'³⁵

2. *Statute of Limitations and Disability Statute.*—In *D'Andrea v. Montgomery Ward & Co.*,³⁶ the Seventh Circuit Court of Appeals reversed the trial court's grant of summary judgment for the defendant. In *D'Andrea* the plaintiff received her injuries shortly before her sixth birthday. Under the Indiana disability statute,³⁷ a minor plaintiff has two years after his disability is removed within which to bring his action. *D'Andrea* filed her complaint on February 14, 1975, ten months before her twenty-third birthday. On July 26, 1973, when the plaintiff was twenty years of age, and before the filing of her complaint, the age of majority in Indiana was reduced from twenty-one to eighteen years of age.³⁸ Thus, under the amended law a minor has until his twentieth rather than his twenty-third birthday within which to commence his action. The trial court held that the plaintiff was bound by the modified law and, therefore, was barred

³³The *Haun* court stated:

However, the evidence adduced at trial does not as a matter of law mandate the finding that Haun either incurred the risk of his injuries or was contributorily negligent. First, there is a factual question as to the voluntariness of Haun's conduct. Kroger was responsible for requiring Haun to unload the pallets in the limited area.

379 N.E.2d at 1014.

³⁴See *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367 (E.D. Ark. 1971); *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 238 S.W.2d 172 (1951); *Brown v. Quick Mix Co.*, 75 Wash. 2d 833, 454 P.2d 205 (1969).

³⁵*Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971) (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1177 (1956) (quoting *Thrusell v. Handyside*, 20 Q.B.D. 359, 364 (1888))).

³⁶571 F.2d 403 (7th Cir. 1978).

³⁷IND. CODE § 34-1-2-5 (1976) provides that persons under legal disability have two years after the disability is removed within which to file their actions. At the time of plaintiff's injury, Act of Apr. 7, 1881, ch. 38, § 857, 1881 Ind. Acts 388 (amended 1973), defined persons under the age of twenty-one years as being under a legal disability.

³⁸See IND. CODE § 34-1-67-1 (1976), as amended by Act of Apr. 16, 1973, Pub. L. No. 313, § 3, 1973 Ind. Acts 1717.

by the statute of limitations. On appeal, the Seventh Circuit pointed out that under the disability statute the two-year grace period does not begin to run until the disability is removed.³⁹ The *D'Andrea* court then held that plaintiff's disability (minority) was removed by legislative act on July 23, 1973, when the amendment became effective, and that the plaintiff still had two years from the effective date of the amendment, or until July 23, 1975, within which to bring her action.⁴⁰ Since the plaintiff had commenced her action on February 14, 1975, her suit was timely under the amended statute.⁴¹

Attorneys should be aware that the present state of Indiana law concerning disability statutes has been modified in two important ways. If the action does not come under the new products liability statute,⁴² the age of majority for minors is eighteen years of age, and the two-year grace period will extend the time within which to bring the action until age twenty. If the action is within the ambit of section 5 of the statute, and if this section is held constitutional, there will be no extension of time for minors.⁴³

3. *Successor Corporations' Liability.*—In *Travis v. Harris Corp.*,⁴⁴ the defendant corporation, successor corporation, had purchased the assets of a prior corporation, predecessor corporation, which had manufactured and marketed an allegedly defective product which had injured the plaintiff.⁴⁵ The decision of the Seventh Circuit Court of Appeals, holding the successor corporation not liable for the plaintiff's injuries, was based upon traditional doctrines of corporate law. These principles "were developed primarily for the purposes of creditor protection, tax assessment, and the resolution of dissenting shareholder claims."⁴⁶ These policy considerations underlying corporate law and the rule of non-liability for successor corporations were established before the concept of strict tort liability for products was generally adopted.⁴⁷ The ability of the

³⁹571 F.2d at 404.

⁴⁰*Id.*

⁴¹*Id.*

⁴²IND. CODE § 33-1-1.5-1 to 8 (Supp. 1978).

⁴³*Id.* § 33-1-1.5-5 states in pertinent part: "Statute of Limitations. This Section applies to all persons regardless of minority or legal disability." The constitutionality of this provision is discussed at notes 181-96 *infra* and accompanying text.

⁴⁴565 F.2d 443 (7th Cir. 1977).

⁴⁵The *Travis* court also discussed the liability consequences when "merger and consolidation" are involved in the acquisition. This aspect of the case and a full explanation of the factual background are more fully discussed in *Corporations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 94, 105-10 (1978).

⁴⁶Note, *Products Liability—Corporations—Asset, Sales and Successor Liability*, 44 TENN. L. REV. 905, 908 (1977).

⁴⁷See *id.*

manufacturer to absorb or spread the cost of such injuries, safety incentives, consumer expectations, and plaintiff's problems of proof, were the primary policy considerations for the establishment of strict liability for products.⁴⁸ Thus, the policy considerations of corporate law and strict tort liability were established on a completely different policy basis. The *Travis* court chose to reject the policy behind strict liability and grounded its decision on corporate doctrines.⁴⁹ Recent decisions in other jurisdictions, however, have analyzed the problem of successor corporations, including mere cash purchases of assets, in a different manner.⁵⁰ These jurisdictions have found corporate law principles inadequate because the issue of successor liability for defective products should be governed by the policies underlying products liability law.⁵¹ Jurisdictions which have rejected the use of corporate law in the successor corporation situation have established two new approaches to the problem: the products liability continuity principle⁵² and the product line⁵³ theory. Under the products liability continuity principle, the successor corporation may be held responsible by showing:

- (1) [A] continuity of management, personnel, location, assets and general business operations, (2) the prompt cessation, liquidation, and dissolution of seller, (3) and assumption by the buyer of those liabilities and obligations ordinarily necessary for the uninterrupted conduct of the business, and (4) a representation by the purchasing corporation that it is the effective continuation of the seller.⁵⁴

The product line theory would hold the successor corporation liable if:

- (1) [T]he plaintiff would face insuperable obstacles in attempting to obtain satisfaction from the predecessor, (2) at the time of the acquisition, the successor possessed adequate knowledge to gauge the risks of injuries from previously

⁴⁸See Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 IND. L. REV. 395, 407-08 n.75 (1976); Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. REV. 339, 339-40 (1974).

⁴⁹565 F.2d at 448.

⁵⁰See *Ray v. Alad Corp.*, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Turner v. Bituminous Cas. Co.*, 399 Mich. 406, 244 N.W.2d 873 (1976). See also *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974).

⁵¹See, e.g., *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 416, 244 N.W.2d 873, 877 (1976).

⁵²*Id.* at 424, 244 N.W.2d at 881.

⁵³*Ray v. Alad Corp.*, 560 P.2d 3, 11, 136 Cal. Rptr. 574, 582 (1977).

⁵⁴Note, *supra* note 46, at 913-14 (discussing *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (1976)).

manufactured products, and (3) the successor corporation acquired the good will and other intangible assets of the predecessor to which responsibility could fairly be attached.⁵⁵

Because of the completely different purposes for the corporate non-liability rule, it would seem a better approach to analyze successor corporations' liability for injury from continuing products using products liability policies under one of the above theories.

4. *Warnings and Standards for Strict Liability in Tort.*—*Travis*, in addition to discussing the successor corporation issue, raised an interesting question regarding the defendant's failure to warn. The plaintiff contended that the successor corporation had on one occasion performed service on the allegedly defective product produced by the predecessor corporation. Under these circumstances, the plaintiff alleged that the successor corporation failed to warn concerning the dangers in the product. The *Travis* court stated, as one ground for rejecting plaintiff's argument, that the successor corporation had no knowledge of the defect and, absent such knowledge, nothing is known to warn against.⁵⁶

The *Travis* approach to finding or rejecting a "warning defect" seems to conflict directly with all generally accepted theories for establishing the defect element in strict tort cases. Because of vagueness and ambiguity in the "consumer expectation test" as set forth in Comments g, h, and i to section 402A,⁵⁷ two alternative approaches have been advanced to establish the standards of defectiveness. The first alternative was proffered by Deans Wade⁵⁸ and Keeton.⁵⁹ This "Wade/Keeton" standard states that the primary difference between negligence and strict liability is one of knowledge

⁵⁵Note, *supra* note 46, at 914-15 (discussing *Ray v. Alad Corp.*, 560 P.2d 3, 136 Cal. Rptr. 574 (1977)).

⁵⁶565 F.2d at 448-49.

⁵⁷The term "consumer expectation test" seems to have arisen from the comments to RESTATEMENT (SECOND) OF TORTS § 402A (1965). Comment g states in part: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a *condition not contemplated by the ultimate consumer*, which will be unreasonably dangerous to him." (Emphasis added). *Id.* Comment h states in part: "A product is not in a defective condition when it is safe for normal handling and consumption." *Id.* Comment i states in part: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

⁵⁸See Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

⁵⁹See Keeton, *Product Liability and The Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

or scienter.⁶⁰ Dean Wade contends that, in strict liability cases, knowledge of the injuring defect should be imputed to the manufacturer or seller whether or not he had actual knowledge.⁶¹ The issue then becomes whether the seller with such knowledge would have been negligent for marketing the product. Thus, strict liability differs from negligence in that actual or constructive knowledge of the defect is usually required in negligence cases, whereas, in strict liability, the knowledge of the defect is assumed.⁶² The second approach for setting a standard for strict liability in tort was established by the California Supreme Court in *Barker v. Lull Engineering Co.*⁶³ The California standard states that liability in products cases involving design defects may be established if: (1) The plaintiff proves "that the product failed to perform as safely as the ordinary consumer would expect when used in an intended or reasonably foreseeable manner,"⁶⁴ or (2) the plaintiff proves that "the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."⁶⁵

Under either the Wade/Keeton approach or the California approach, knowledge of the defect in the product is either imputed or

⁶⁰See Keeton, *supra* note 59, at 37-38; Wade, *supra* note 59, at 834-35.

⁶¹See Wade, *supra* note 58, at 834-35.

⁶²*Id.* at 835.

⁶³573 P.2d 443, 143 Cal. Rptr. 225 (1978).

⁶⁴*Id.* at 455-56, 143 Cal. Rptr. at 237-38. The California Supreme Court stated that the consumer expectation test is the floor, not the ceiling on the manufacturer's responsibility, i.e., it is merely the minimal requirement. In addition, the consumer expectation test may frequently be used in situations where circumstantial evidence is resorted to, especially where the accident itself precludes identification of the specific defect. The court recognized, however, that the consumer expectation test may be a poor yardstick because, in many situations, the consumer has no idea how safe the product could be made. *Id.* at 454, 143 Cal. Rptr. at 236.

⁶⁵*Id.* at 456, 143 Cal. Rptr. at 238. The court, in specifying what factors are relevant, stated the jury may consider: (1) The gravity of danger of the design, (2) the likelihood of the danger occurring, (3) the mechanical feasibility of a safer alternative design, (4) the financial cost of an improved design, and (5) the adverse consequences resulting from any alternative design. *Id.* at 455, 143 Cal. Rptr. at 237. The California court made it clear that the defendant had the burden of proving, not merely the burden of producing evidence, that the benefits of the challenged design outweighed the risk of danger inherent in such design. *Id.* The court stated further that the jury's focus should be directed at the product and not at the reasonableness of the manufacturer's conduct. *Id.* at 456, 143 Cal. Rptr. at 238. Thus, the fact that the manufacturer acted as a reasonably prudent manufacturer by taking reasonable precautions in attempting to design a safe product would not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concluded that the product's design was unsafe to consumers, users, or bystanders.

irrelevant. Under the Wade/Keeton approach, for example, the manufacturer in *Travis* would have been charged with the knowledge of the defect and might have been liable for failing to warn of the dangers in the product.

5. *Foreseeability and Intended Use.*—In *Huff v. White Motor Corp.*⁶⁶ the trial court had found that the plaintiff could not recover for “enhanced injuries”⁶⁷ (death) when a tractor overturned and its fuel tank caught fire. The plaintiff alleged that the fire resulted from a defectively designed fuel tank and that, absent such a defect, decedent’s injuries would have been less severe. The trial court rejected this argument and applied the rationale of *Evans v. General Motors Corp.*⁶⁸ In *Evans*, the Seventh Circuit Court of Appeals denied recovery based upon an extremely narrow foreseeability concept and “intended use” rationale.⁶⁹ Under the *Evans* approach, the “intended use” of a product was determined from the subjective viewpoint of the manufacturer. This “intended use” approach predated the modern view of strict liability and was an archaic remnant of early negligence law.⁷⁰ In addition, the *Evans* approach severely limited the foreseeability concept in products cases to such an extent that the sellers of products could practically ignore the consequences of placing their product in various environments.⁷¹

The Seventh Circuit, in reversing the trial court, noted that only Indiana, Mississippi, and West Virginia⁷² followed the *Evans* doctrine, while thirty jurisdictions had rejected the *Evans* case.⁷³ Overruling both *Evans* and *Schemel v. General Motors Corp.*,⁷⁴ the *Huff* court stated that the “intended use” construction was too narrow and unrealistic and that, henceforth, reasonable foreseeability, including a manufacturer’s consideration and anticipation of the environment in which its product will be used, would be the rule for products liability cases.⁷⁵ The *Huff* court concluded: “No rational

⁶⁶565 F.2d 104 (7th Cir. 1977).

⁶⁷“Enhanced injury” or “second collision” cases are situations in which the defect does not cause the original collision or impact, but the defect does increase the severity of plaintiff’s injury after the original collision. See Vargo, *Products Liability in Indiana: In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 877-78 (1977).

⁶⁸359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966).

⁶⁹*Id.* at 825. See Vargo, *supra* note 67, at 878-81.

⁷⁰See Vargo, *supra* note 67, at 878-81

⁷¹*Id.*

⁷²565 F.2d at 111 app. B (citing *Walton v. Chrysler Motor Corp.*, 222 So. 2d 568 (Miss. 1969); *McClung v. Ford Motor Co.*, 333 F. Supp. 17 (S.D. W. Va. 1971), aff’d, 472 F.2d 240 (4th Cir.), cert. denied, 412 U.S. 940 (1973).

⁷³For a list of the jurisdictions rejecting *Evans*, see 565 F.2d at 110-11 app. A.

⁷⁴384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).

⁷⁵565 F.2d at 108-09.

basis exists for limiting recovery to situations where the defect in design *or manufacture* was the causative factor of the accident . . ." and that the "enhanced injuries" (second collision cases) and the accident itself were all foreseeable events.⁷⁶

With the overruling of *Evans* and *Schemel*, the narrow "intended use" and foreseeability doctrines have been overcome. In addition, the *Huff* decision implies that other narrow and restrictive doctrines of bygone days, such as the obvious danger rule, are now subject to change.⁷⁷

6. *Chain of Custody.*—In both *Smith v. Crouse-Hinds Co.*⁷⁸ and *Fruehauf Trailer Division v. Thornton*,⁷⁹ the Indiana Court of Appeals discussed the "chain of custody" of a product. In *Thornton*, the court pointed out that, under the evidentiary standards, it is necessary for the plaintiff to show that the product has not been altered or tampered with from the time of injury until trial.⁸⁰ The *Crouse-Hinds* court further stated that the admission of an item or product as "real evidence" may be based upon circumstantial evidence. Thus, authentication of the product as being "the" product producing the injury may, in discretion of the trial court, be accomplished with evidence which shows a "reasonable probability" that the product is the one in question.⁸¹

B. Indiana's New Product Liability Statute

1. *A Brief History.*—Shortly before the end of the 1978 session, the Indiana General Assembly enacted Public Law 141⁸² to amend title 33 of the Indiana Code.⁸³ This Act, approved March 10, 1978, includes a chapter, effective June 1, 1978,⁸⁴ which governs products liability actions "including those in which the theory of liability is

⁷⁶*Id.* at 108 (emphasis added).

⁷⁷For an explanation of the "obvious danger rule" and its genesis in Indiana law, see Vargo, *supra* note 67, at 884-88.

⁷⁸373 N.E.2d 923, 926-28 (Ind. Ct. App. 1978).

⁷⁹366 N.E.2d 21, 30-31 (Ind. Ct. App. 1977).

⁸⁰*Id.* at 31.

⁸¹373 N.E.2d at 928.

⁸²Act of Mar. 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE §§ 33-1-1.5-1 to 8 (Supp. 1978)).

⁸³In INDIANA STATUTES ANNOTATED, the compiler transferred the products liability chapter to Title 34, "Limitations of Actions." See IND. CODE ANN. § 34-4-20A-1 to 8 (Burns Supp. 1978). The transfer apparently reflected the compiler's view that the subject matter of products liability is not substantially related to that of courts and court officers and that the Act's statute of limitations provision is its most significant feature.

⁸⁴IND. CODE § 33-1-1.5-8 (Supp. 1978).

negligence or strict liability in tort," but "does not apply to actions arising from or based upon any alleged breach of warranty."⁸⁵ Also excluded are actions accruing before June 1, 1978.⁸⁶

The products chapter was enacted following a six-month period of testimony before the Select Joint Committee on Product Liability created by the Indiana Legislative Council.⁸⁷ The Committee heard from manufacturers,⁸⁸ manufacturing engineers,⁸⁹ manufacturing⁹⁰ and selling associations,⁹¹ and manufacturers' attorneys.⁹² These witnesses generally asserted that, while product liability premiums were skyrocketing,⁹³ there was no corresponding deterioration in manufacturing practices that could justify the premium increases.⁹⁴ Representatives of the insurance industry testified that the explosion in premiums was the result of the increasing frequency of claims and the increasing size of awards.⁹⁵ They were joined by the manufacturers and sellers in urging the legislature to enact various

⁸⁵*Id.* § 33-1-1.5-1 (Supp. 1978).

⁸⁶*Id.* § 33-1-1.5-1(b).

⁸⁷See Lyst, *Businessman's Liability Issue to be Debated*, Indianapolis Star, June 9, 1977 at 63, col. 1. (noting that Robert J. Fair, president pro tempore of the Indiana Senate, had pocket vetoed a earlier House-introduced bill which he felt was hastily enacted).

⁸⁸See *Minutes of the Select Joint Committee on Products Liability*, 1977 Indiana Legislature (minutes of July 25, 1977) (statements of Clint Hartman, CTS Corp.; Franklin Greb, Bucyrus—Erie; Bill Kennedy, Kennedy Tank) (minutes available from the Indiana Legislative Council, 301 State House, Indianapolis, Ind. 46204) [hereinafter cited as *Joint Committee*].

⁸⁹See *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statement of Clark Roggie, Hugh J. Baker & Co.); *id.* (minutes of Aug. 24, 1977) (statements of Bill Derner, FMC Corp.; Max Rumbaugh, Schwitzer Engineered Prod.).

⁹⁰See *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statement of David H. Raridan, Indiana Mfr. Ass'n); *id.* (minutes of Oct. 14, 1977) (statement of Brian J. Krenzke, Indiana Mfr. Ass'n).

⁹¹See *Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statements of H.D. Shafer, Truck Equip. & Body Distrib. Ass'n; Normagene Murray, Indiana Tire Dealers & Retreaders Ass'n).

⁹²See *Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statements of Frank Gilkison, representing Maxon Corp.; Dick Nettleingham, representing Thunderbird Prod.).

⁹³See generally *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statements of every testifying manufacturer or manufacturer representative).

⁹⁴See statements cited in note 89 *supra*.

⁹⁵See *Joint Committee*, *supra* note 88, (minutes of Sept. 19, 1977). The statement of Mavis Walters, Ins. Serv. Office, provided in part: "[T]he increases in claim costs and/or claim frequency exceeded the general increase in inflation. For product liability insurance we know that both of these considerations were factors in the recent rate level increases . . ." The statement of William F. Burfeind, American Ins. Ass'n provided in part: "Not only has the dollar value of products liability suits risen, but the number of suits and claims filed has multiplied . . ." See also Note, *When the Product Ticks: Products Liability and Statutes of Limitation*, 11 IND. L. REV. 693, 694-99 (1978).

modifications to the tort laws which would, in effect, cut off claims that had been previously considered meritorious.⁹⁶ The Committee also heard testimony from a public interest group⁹⁷ and from organized labor,⁹⁸ both urging that there be no erosion of claimants' rights. In addition, two legal scholars in the area of tort law⁹⁹ attempted to explain the doctrines and defenses underlying the law of products liability to the Committee.

2. *Codification of the Common-Law Strict Tort Doctrine.*—a. *Strict Tort and Warranty.*—The chapter, as enacted, includes product liability actions brought under negligence and strict tort theories, but excludes alleged breach of warranty actions.¹⁰⁰ Professor Reed Dickerson urged the Select Committee to integrate the strict tort elements of section 402A of the *Restatement (Second) of Torts* into the Indiana version of article 2 of the Uniform Commercial Code (UCC)¹⁰¹ so as to create a single strict liability theory to govern product liability actions.¹⁰² His preference for warranty was based on the affirmative duty of the seller, under the UCC, to market a merchantable product in contrast to the judicially created doctrine of section 402A which emphasizes the negative consequences of selling a defective product. He advised the legislature to amend the Indiana version of the UCC, because, in his opinion, the judicial adoption of section 402A could be subject to a constitutional challenge as being an unlawful attempt by the courts to amend the UCC without legislative enactment.¹⁰³

The Committee rejected Dickerson's proposal to promulgate a single strict product theory under the UCC, but the legislature did purport to legislatively enact the common law strict tort doctrine. Section 3 of the chapter states that it is a codification and restatement of the common law "with respect to strict liability in tort."¹⁰⁴

⁹⁶See, e.g., *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statements of testifying manufacturers and manufacturer's representatives); *id.* (Sept. 19, 1977) (statements of insurance industry representatives).

⁹⁷See *Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statement of Thomas Wathen, Indiana Pub. Interest Research Group).

⁹⁸See *Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statements of Willis Zagrovich, AFL-CIO; Buford Holt, UAW).

⁹⁹See *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statement of Professor Reed Dickerson, Indiana University School of Law); *id.* (minutes of July 8, 1977) (statement of John Vargo, Indianapolis attorney & lecturer).

¹⁰⁰IND. CODE § 33-1-1.5-1 (Supp. 1978).

¹⁰¹IND. CODE §§ 26-1-1-101 to 26-1-2-725 (1976).

¹⁰²See *Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (discussion of Professor Dickerson's testimony and his proposed amendment to Indiana's Uniform Commercial Code).

¹⁰³*Id.*

¹⁰⁴IND. CODE § 33-1-1.5-3 (Supp. 1978).

Unresolved by the statute, however, is the status of another judicial theory which has evolved in Indiana as a hybrid of tort and warranty. Under this theory, claims for personal injury and property damage from defective products under breach of warranty can be characterized to sound in tort.¹⁰⁵ In such actions, the usual UCC contract defenses of notice,¹⁰⁶ disclaimer,¹⁰⁷ limitation of remedy,¹⁰⁸ privity limitations,¹⁰⁹ and the four-years-from-date-of-sale statute of limitation¹¹⁰ are no longer applicable.¹¹¹ The resulting action is so similar to the one brought under strict liability in tort that both are virtually congruent under the case law.¹¹² But, as will be discussed, the new products chapter departs significantly in a number of areas from the developed Indiana products liability common law. The question remains whether these new provisions are to govern "tort-warranties," or whether the warranty action exclusion in section 1 will continue to permit plaintiffs to bring actions with elements similar to "old 402A" under the warranty-sounding-in-tort theory. Although the latter result would appear inconsistent, the legislature could easily have clarified its intent by stating that the chapter was to exclude warranty actions *under the UCC*.¹¹³ Its failure to do so would seem to make the issue litigable.

b. *Duty to Bystanders?*—Section 3 of the chapter¹¹⁴ purporting to codify and restate Indiana's common law with respect to strict liability in tort, tracks, with one important difference, section 402A of the *Restatement (Second) of Torts* which has been expressly adopted by the courts of this state.¹¹⁵ Section 402A provides for protection to *any* user or consumer whose person or property is harmed

¹⁰⁵See *Wright-Bachman, Inc. v. Hodnett*, 235 Ind. 307, 133 N.E.2d 713 (1956); *Fruehauf Trailer Div. v. Thornton*, 366 N.E.2d 21 (Ind. Ct. App. 1977).

¹⁰⁶IND. CODE § 26-1-2-607 (1976).

¹⁰⁷*Id.* § 26-1-2-316.

¹⁰⁸*Id.* § 26-1-2-719.

¹⁰⁹*Id.* § 26-1-2-318.

¹¹⁰*Id.* § 26-1-2-715.

¹¹¹See *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965); *Fruehauf Trailer Div. v. Thornton*, 366 N.E.2d 21, 27 (Ind. Ct. App. 1977).

¹¹²See *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878, 883 (S.D. Ind. 1970); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 431 (N.D. Ind. 1965).

¹¹³The *Digest* to a products liability bill, Ind. H.B. 1258 (1978) introduced into the General Assembly in February 1978 stated it "would not apply to breach of warranty actions, which are brought under the Uniform Commercial Code (IC 26-1)." Section one of the bill, however, excluded only actions "arising from or based upon any alleged breach of warranty."

¹¹⁴IND. CODE § 33-1-1.5-3 (Supp. 1978).

¹¹⁵See *Huff v. White Motor Corp.*, 565 F.2d 104 (7th Cir. 1977); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

by an unreasonably dangerous defect in a product; the chapter limits the protected class to those users and consumers who are in "the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition" ¹¹⁶ Use of the negligence term "reasonably foresee" in this strict tort context suggests that the class of injured users and consumers to be protected by this statute is to be delineated by reference to the manufacturer's conduct rather than the condition of his product. It would be difficult to find recent common law support for that proposition.

Nowhere in the chapter, however, is any provision made for the extension of protection to *bystanders* although Indiana case law has expressly developed that protection.¹¹⁷ An early draft provision presented to the Select Joint Committee did not so limit the class of users and consumers to those reasonably foreseeable, but instead added the following clause: "(or to *any other person* or his property if that person is in the class of persons that the seller should reasonably foresee . . .)." ¹¹⁸ The following staff comment makes clear that the purpose of the added clause was to impose liability on the seller for injuries to bystanders: "Indiana courts, along with the courts of most other states, have extended the application of section 402A to bailors, lessors and bystanders." ¹¹⁹ The reasonable foreseeability provision as applied here to *bystanders* indicates judicial recognition that this class of potential plaintiffs may be far too large to include under strict liability without some appropriate foreseeability limitation.

Although the legislature is certainly empowered to reverse an expansive provision to one of vague limitation, its *stated* purpose in enacting this section was to restate and codify Indiana common law.¹²⁰ Because the new user-consumer limitation clause appears inconsistent with the common law, an ambiguity clearly exists.

¹¹⁶IND. CODE § 33-1-1.5-3(a) (Supp. 1978).

¹¹⁷See *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1976). The court stated: "In Indiana bystanders 'whom the . . . supplier should reasonably foresee as being subject to the harm caused by the defect' may recover under § 402A for injuries caused by a defective product." *Id.* at 742 (quoting *Chrysler v. Alumbaugh*, 342 N.E.2d 908, 917 (Ind. Ct. App. 1976)).

¹¹⁸See Memorandum to members, Select Committee on Products Liability, Oct. 7, 1977, from John R. Molitor, Staff Attorney (attached product liability bill) (memorandum available from the Indiana Legislative Council, 301 State House, Indianapolis, Ind. 46204). This language (without the parentheses) was adopted by the Committee's bill drafting sub-committee. See *Joint Committee*, *supra* note 88, (minutes of Oct. 31, 1977) (attached proposed bill—A Bill For An Act to Amend IC 26, § 2.(a)) [hereinafter cited as *Committee Final Draft*].

¹¹⁹See Memorandum, *supra* note 118, (attached product liability bill) (§ 7, staff comment).

¹²⁰IND. CODE § 33-1-1.5-3 (Supp. 1978).

3. *Definitions.*—a. *User or Consumer.*—The chapter definition of "user or consumer" begins by including "a purchaser; any individual who uses or consumes the product . . .".¹²¹ The initial question raised is whether "a purchaser" is limited to one who actually uses or consumes the product, or does this definition also include a wholesaler or retailer who merely buys the product for resale. The resolution of this question is necessary not only to determine the extent of the protected class, but is also necessary to determine "the date of delivery of the product to the initial user or consumer,"¹²² which is when the chapter's outer cutoff statute of limitations begins to run.

Comment 1 to section 402A makes clear that the persons covered are those who use or consume the product whether they acquired the product through purchase or in some other way, or whether they acquired the product "directly from the seller" or "acquired it through one or more *intermediate dealers*".¹²³ Dealers are thus distinguished, in Comment 1, from users or consumers.

Comment 1 also clearly states that a user may be one passively enjoying the benefit of the product "as in the case of passengers," or may be one who holds, prepares, or repairs a product for another.¹²⁴ The chapter definition does not address these perhaps marginal classes of user or consumer, although a Select Joint Committee final draft bill did.¹²⁵

The chapter definition does, however, include as users or consumers "any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question."¹²⁶ What the legislature intended in this clause is far from clear. The source of the language appears to be a Massachusetts insurance industry sample statute.¹²⁷ That statute seems to be aimed

¹²¹*Id.* § 33-1-1.5-2.

¹²²*Id.* § 33-1-1.5-5.

¹²³RESTATEMENT (SECOND) OF TORTS § 402A, Comment 1 (1965) (emphasis added).

¹²⁴*Id.*

¹²⁵See Committee Final Draft, *supra* note 118, § 2.

¹²⁶IND. CODE § 33-1-1.5-2 (Supp. 1978).

¹²⁷The sample statute provides:

"User" shall include: a purchaser; any individual who uses or consumes the product; where the injured party is a minor or incompetent, anyone acting for or on behalf of such party; any employer or co-employee while acting within the scope of their employment, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question.

Sample Statute, Independent Ins. Agents of Mass., reprinted in part in *Product Liability Insurance: Hearings on S. 403 Before the Sub-Comm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. at 475 [hereinafter cited as *S. 403 Hearings*].

at permitting employees, co-employees, and persons similarly situated, who have possession and control of products, to maintain product liability actions, presumably for purposes of indemnification, against product manufacturers if an employee is injured by a defect in the product. One can only speculate how the courts will interpret the Indiana version of this provision since even the more complete Massachusetts definition is murky.

b. *Products Liability Action.*—Section 2 of the chapter lists the injuries for which product liability actions may be brought: "[P]ersonal injury, disability, disease, death or property damage."¹²⁸ It then sets out the types of defects which may be alleged to have caused the harm: "[M]anufacture, construction or design of any product."¹²⁹ Notably absent from the defect class is the failure to warn or give adequate instructions.¹³⁰ Comment j to section 402A imposes a duty on the seller to warn of dangers not "generally known and recognized."¹³¹ Failure to warn of latent defects is fully recognized in Indiana case law as a defect under strict tort and as a breach of duty under negligence.¹³² Although this section of the statute is written inclusively, the omission by the legislature of the warning defect must be given some weight. Plaintiffs may now find it expedient to bring warning cases under a warranty theory or argue that a failure to warn or give adequate instructions is a design defect.

c. *Physical harm.*—A number of injuries to be covered by the chapter are listed under the definition of product liability action.¹³³ Two of these, "disease" and "disability" are omitted from a list of

¹²⁸IND. CODE § 33-1-1.5-1 (Supp. 1978).

¹²⁹*Id.*

¹³⁰For a statute which specifically includes failure to warn or instruct, see UTAH CODE ANN. § 78-15-3 (1977). The actions subject to the statute are: "(a) Breach of any implied warranties; (b) Defects in design, inspection, testing or manufacture; (c) *Failure to warn*; (d) *Failure to properly instruct in the use of a product*; or (e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product." *Id.* (emphasis added). Although this section prohibits bringing these actions after the repose periods, it does recognize that failure to warn and properly instruct are grounds for timely products liability actions on a par with defective design or manufacture.

See also Sample Statute, American Ins. Ass'n, *reprinted in part in S. 403 Hearings, supra* note 127, at 471, which provides: "'Products liability action' shall include all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, warning, instructing, marketing, packaging or labeling of any product."

¹³¹RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

¹³²See *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Gilbert v. Stone City Constr. Co.*, 357 N.E.2d 738 (Ind. Ct. App. 1978); *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975).

¹³³IND. CODE § 33-1-1.5-2 (Supp. 1978).

"physical harms" under the definition of that term.¹³⁴ Both the physical harm and product liability action definitions are written inclusively so that where the plain sense of physical harm clearly includes disease and disability a court is likely to include them.

Perhaps more serious, however, is the listing of loss of services as a physical harm, but not as a product liability action.¹³⁵ The omission is not so readily remedied by a plain sense understanding of what is a "products liability action." Although section 3 of the chapter makes a seller liable for physical harm,¹³⁶ it might be argued that section 3 should not be applied to an action for loss of services inasmuch as that injury does not, under the statutory definition, lead to a product liability action.

d. *Seller.*—Section 2 includes "manufacturer, a wholesaler, a retail dealer or a distributor."¹³⁷ Unlike Comment f to section 402A, section 2 does not include the operator of a restaurant or a seller of services who also sells some goods on the premises. The chapter definition also does not specifically exclude, as does Comment f, the casual seller and the seller who sells "out of the usual course of business."¹³⁸ The status of these additional and omitted classifications will presumably be left to Indiana case law.

3. *Defenses.*—Although section 1 states that the chapter is applicable to both negligence and strict liability in tort, section 4 purports to list defenses applicable only to strict tort actions¹³⁹ with burden of proof to be placed on the defendant.¹⁴⁰ Presumably common law defenses will continue to apply to claims brought under a negligence theory.

a. *Assumption of Risk (Incurred Risk).*—The first defense listed is section 4(b)(1): "It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it."¹⁴¹ This language does not include all of the elements required under any traditional approach to assumption of risk. The language does, however, seem to be an attempt to follow the language contained in Comment n of section 402A.¹⁴² Absent is any mention of the

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.* § 33-1-1.5-3.

¹³⁷*Id.* § 33-1-1.5-2.

¹³⁸RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

¹³⁹IND. CODE § 33-1-1.5-4 (Supp. 1978).

¹⁴⁰*Id.* § 33-1-1.5-4(a) states: "The defenses in this chapter are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense."

¹⁴¹*Id.* § 33-1-1.5-4(b)(1).

¹⁴²Comment n is set forth in note 27 *supra*.

elements of understanding, appreciation, and voluntariness.¹⁴³ In addition, there is no mention of whether a subjective or objective test will be used to determine the plaintiff's awareness of the danger. The phrase "unreasonably to make use of the product" may indicate an attempt by the drafters to include only the "overlap" area of contributory negligence and assumption of risk, i.e., where the defendant has breached a duty and the plaintiff assumes an unreasonable risk, as discussed in *Kroger Co. v. Haun*.¹⁴⁴ Also significant is the absence of any mention of "reasonable assumption of risk" as a defense.¹⁴⁵ Only future litigation can resolve the question of what actually constitutes a defense under section 4(b)(1). A reasonable construction, in light of section 3's statement that the common law of strict liability is being codified, would be that past case law is applicable in interpreting section 4. Thus, it would follow that assumption of risk, as described in *Haun*, would be applicable to section 4.

b. *Misuse*.—"Nonforeseeable misuse" of the product is considered a defense under section 4(b)(2).¹⁴⁶ The word "nonforeseeable" indicates that, if the plaintiff's misuse were foreseeable,¹⁴⁷ there would be no bar to his recovery. This result seems to comply with traditional foreseeability concepts.¹⁴⁸ The misuse section also states

¹⁴³Assumption of risk traditionally has required the elements of knowledge, understanding, appreciation, and voluntariness. See Vargo, *supra* note 67, at 893.

¹⁴⁴379 N.E.2d 1004 (Ind. Ct. App. 1978). See notes 10-32 *supra* and accompanying text.

¹⁴⁵See notes 28-32 *supra* and accompanying text.

¹⁴⁶IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1978) states:

It is a defense that a cause of the physical harm is nonforeseeable misuse of the product by the claimant or any other person. Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

¹⁴⁷For purposes of contrast, note the following sample statute which does not incorporate foreseeability concepts into the definition of misuse: "A manufacturer of a product . . . shall not be liable for damages . . . sustained by reason of an alleged defective condition in such product, if the allegedly defective condition of such product was due to the alteration, modification or misuse of such product, subsequent to its manufacture or sale." Sample Statute, Independent Ins. Agents of Mass., *reprinted in part in S. 403 Hearings, supra* note 127, at 478.

¹⁴⁸See *Zahora v. Harnischfeger Corp.*, 404 F.2d 172, 177 (7th Cir. 1968); *Elder v. Fisher*, 247 Ind. 598, 605-06, 217 N.E.2d 847, 852 (1966); *Dreibelbis v. Bennett*, 162 Ind. App. 414, 420-21, 319 N.E.2d 634, 638 (1974); *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 229, 279 N.E.2d 266, 267 (1972). In *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 778 (S.D. Ind. 1969), the court came very close to stating that misuse, when foreseeable, is not a defense. The court stated: "In essence, defendant contends that the injury arose from the use of the mower and not from any negligence on the part of defendant or defect in the product . . ." *Id.* at 778. The court then stated that

that, if there is harm caused jointly by a defect in the product and "misuse" by someone other than the claimant/user, then the concurrent acts of the third party will not bar the user from recovery, but only the third party.¹⁴⁹ Absent from the language of section 4(b)(2) is any proximate cause language requiring that the misuse of the third party be a "substantial factor" of the injury.¹⁵⁰ Thus, another litigable issue is raised by the statute.

The language of section 4(b)(2), concerning concurrent acts of third parties, is apparently directed at certain employment situations in which an employee is injured by a manufacturer's defective product.¹⁵¹ Because of the workmen's compensation statute, the employer must pay compensatory benefits to the injured employee. If the employee fails to bring his own action against the manufacturer of the defective product within two years of his injury, the manufacturer may under the workmens compensation statute bring an action either in the employee's name apparently as a subrogee or in his own name as a direct claimant. Section 4(b)(2) would appear to bar such employer actions where the employer's misuse of the product was a concurrent cause of the employee's injury.

On the other hand, if the employee does bring his action timely and recovers, the workmen's compensation statute gives the employer a lien to the extent of his workmen's compensation benefits against the employee's judgment or settlement. In this

foreseeable intervening acts did not alter a finding of proximate cause. *Id.* But see *Latimer v. General Motors Corp.*, 535 F.2d 1020 (7th Cir. 1976). The court stated: "In essence, the plaintiff attempts to graft onto his theory of strict liability an element of foreseeability. Latimer asserts that a manufacturer should anticipate a 'misuse' of the product and design safeguards against that contingency. Such is not the law." *Id.* at 1024. The court cited *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967) for the proposition that "a manufacturer is under no obligation to foresee and to guard against a danger that results from a misuse of the product." 535 F.2d at 1024.

But in *Huff v. White Motor Corp.*, 565 F.2d 104, 109 (7th Cir. 1977), the court held motor vehicle manufacturers have a duty to anticipate and take precautions against reasonably foreseeable risks in the use of their products. The *Huff* holding could be read as limited to enhanced injury cases, yet the court took pains to state its view that Indiana courts are now guided by broad policy considerations expanding protection to consumers. Clearly, certain foreseeable misuses will not bar plaintiff's recovery if the manufacturer's *intended use is too narrow*. "Thus, to say that collisions are not within their 'intended purpose' is unrealistic. This view narrowly refuses to include the obvious risks against which a manufacturer can take precautions." *Id.* On the other hand, the *Huff* court would not rule out all foreseeable misuse defenses. "*Schemel* actually dealt with a misuse of the vehicle and analytically is not apposite." *Id.*

¹⁴⁹IND. CODE § 33-1-1-5-4(b)(2) (Supp. 1978).

¹⁵⁰"Substantial factor" seems to be the required element of proximate cause. See RESTATEMENT (SECOND) OF TORTS §431 (1965).

¹⁵¹See Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 Mercer L. Rev. 373, 389 (1978).

case, the employer would appear to be neither a subrogee or claimant but a lienholder, and section 4(b)(2) would seem not to operate to bar his recovery even if he were a concurrent misuser.¹⁵²

c. *Modification or Alteration.*—Section 4(b)(3) of the chapter states that any “nonforeseeable” alteration or modification which proximately causes physical harm is a defense.¹⁵³ As stated previously, section 4 places the burden of proving a defense on the defendant. Thus, the defendant must prove modification or alteration of the product, *and* that such modification or alteration was the proximate cause of plaintiff’s harm. The “nonforeseeability” language suggests, if such modification or alteration were foreseeable and even though it were the sole cause of plaintiff’s injury, there would be no bar to plaintiff’s recovery. Although Comment p of section 402A takes no stand concerning “substantial change” in the product after it leaves the seller’s hands, it does state that not all changes in the product will bar a plaintiff’s recovery.¹⁵⁴ Prior Indiana decisions dealing with this issue have been consistent with the *Restatement*.¹⁵⁵ Thus, if the nonforeseeability language of section 4(b)(3) is an attempt to follow either Comment p of section 402A or past Indiana decisions, not all modifications or alterations would bar a plaintiff’s recovery.

d. *State of the Art.*—Section 4(b)(4) provides a defense when “the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.”¹⁵⁶ If the term “generally recognized”

¹⁵²See IND. CODE § 22-3-2-13 (1976). Where the employer or his carrier pays out workmen’s compensation payments to the employee and the employee is awarded judgment against a third party, IND. CODE § 22-3-2-13 (1976), provides that the employer “shall have a lien upon any settlement, judgment or fund out of which such employee might be compensated from the third party.”

¹⁵³*Id.* § 33-1-1.5-4(b)(8) (Supp. 1978) states: “It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm.”

¹⁵⁴RESTATEMENT (SECOND) OF TORTS § 402A, Comment p (1965), states in part: In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section.

¹⁵⁵See, e.g., *Cornette v. Searjeant Metal Prods., Inc.*, 147 Ind. App. 46, 55-67, 258 N.E.2d 652, 657-65 (1970) (Sharp, J., concurring).

¹⁵⁶IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978).

refers to actual industry practices in use at the time of design or manufacture, the provision would conflict with the generally accepted view that state of the art is only to be judged by what is scientifically and economically feasible, not by comparison with general industry custom.¹⁵⁷ The underlying policy for the more stringent test was established in the famous negligence case, *The T.J. Hooper*,¹⁵⁸ where judicial distrust was expressed for allowing any industry to internally establish its own standard of conduct.

Another troublesome problem is suggested by the statute's measuring of the state of the art "at the time the product was designed and manufactured."¹⁵⁹ Because design invariably proceeds manufacture, this language would appear to require the judging of a product's conformity to a state of art in existence when the original design was prepared. Insofar as products manufactured today are fashioned from old designs, the manufacturer's liability could be measured by an antiquated standard. This provision in section 4(b)(4) can operate only as an incentive for manufacturers to retain obsolete designs with obsolete safety features. Under the generally accepted view, the "state of the art" is measured by evidence of what the manufacturer could *feasibly* design or manufacture *at the time of the plaintiff's injury or at the time of trial*.¹⁶⁰

4. *Statute of Limitations.*—On its face, section 5, providing for a limitations statute to govern the products liability actions covered by the chapter, appears to broaden greatly the time frame within which a plaintiff might bring an action: "[A]ny product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer"¹⁶¹ The use of the disjunctive would seem to grant plaintiff an option to pursue his relief within two years of his injury or within ten years of the product's delivery. Although the legislature is clearly empowered to increase the time in which a plaintiff may bring an action, such legislative intent is sure to be questioned inasmuch as the purpose of product liability statutes is to address the problems resulting from the soaring cost of liability insurance.¹⁶²

¹⁵⁷See generally Phillips, *The Standard for Determining Defectiveness in Products Liability*, U. CIN. L. REV. 101, 112-18 (1977).

¹⁵⁸60 F.2d 737, 740 (2d Cir. 1932).

¹⁵⁹Compare, IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978) with Sample Statute, Independent Ins. Agents of Mass., reprinted in S.403 Hearings, *supra* note 127, at 475. The sample statue provides a defense only if "the product was designed in accordance with the state of the art existing at the time the manufacturer . . . parted with possession and control or sold it which ever occurred last." *Id.* (emphasis added).

¹⁶⁰See Keeton, *supra* note 59, at 38-39; Phillips, *supra* note 157, at 115-18.

¹⁶¹IND. CODE § 33-1-1.5-5 (Supp. 1978).

¹⁶²See notes 88-96 *supra* and accompanying text.

Reference to House Bill No. 1258 reveals language similar to the enacted bill, with the exception that the two limitation provisions are joined with the word "and" rather than "or."¹⁶³ Although the legislature in conference committee might have chosen a completely opposite course to that introduced in the House, such an analysis would find the clause following, "initial user or consumer," to be mere surplusage. This clause states: "[E]xcept that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues."¹⁶⁴ Unless the ten-year period was intended to be an outer cutoff, there would be no need to state again that the plaintiff has two years in which to bring his action if his injury occurs during the ninth or tenth year of the life of the product. The purpose of this clause is clearly to insure that all plaintiffs injured within ten years of delivery will, nevertheless, have a full two years to file a claim.

As we noted in the discussion of the definition of user or consumer,¹⁶⁵ there is some question whether the delivery referred to in section 5 refers to the delivery to the initial purchaser, who may be merely a reseller, or whether the statute is to run only when the product is delivered to one who *actually* uses or consumes it.¹⁶⁶ Delivery to the latter can occur in some cases several years after delivery to the former.¹⁶⁷

Assuming that the ten-year limitation is an outer cutoff provision, it is clear that its effect will be to cut off claims of some plaintiffs before they are injured, that is, before their causes of action

¹⁶³Ind. H.B. 1258 § 5 (1978).

¹⁶⁴IND. CODE § 33-1-1.5-5 (Supp. 1978).

¹⁶⁵*Id.* § 33-1-1.5-2. See notes 121-23 *supra* and accompanying text.

¹⁶⁶The following enacted and proposed repose provisions suggest examples of acts which may cause the limitation statutes to begin running: (1) Sample Statutes American Ins. Ass'n, *reprinted in part in S. 403 Hearings, supra* note 127, at 472 ("no later than eight (8) years after the manufacture[r] of the final product parted with its possession and control, or sold it, whichever occurred last . . ."); (2) Sample Statute, American Mut. Ins. Alliance, *id.* ("____ years after the product was first sold to any person not engaged in the business of selling the product."); (3) FLA. STAT. ANN. §§ 95.031(2), 95.11(3) (West Supp. 1978) ("within 12 years after the date of delivery of the completed product to its original purchaser . . ."); (4) UTAH CODE ANN. § 78-15-3 (1977) ("six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture . . ."). The Utah statute provides a separate longer cutoff period for manufacturers so that retailers, against whom users and consumers are awarded judgment after the six-year period has run, will still have four years in which to seek indemnification from the manufacturer.

¹⁶⁷"Some products such as ammunition, nails and the like have unlimited shelf lives and may remain unsold in the retailer's hands for several years." Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. REV. 663, 671 n.38 (1978).

accrue. Such departure from traditional tort doctrine has been criticized as "inequitable, perhaps unconstitutional and probably unnecessary."¹⁶⁸ Proposals to rebalance the equities through enactment of exceptions have been analyzed as unworkable since "application of the rule will be so irregular as to be arbitrary."¹⁶⁹

The constitutionality of repose statutes, as these outer cutoff limitations have been characterized, has been challenged in other jurisdictions under state and federal equal protection clauses¹⁷⁰ and clauses in state constitutions guaranteeing a remedy for every injury.¹⁷¹ Under the former, the class of architects and builders has

¹⁶⁸Note, *supra* note 95, at 725. After analysis of the available data, the Note concludes that, although a general economic crisis may not yet have arisen, a serious problem faces many sellers because of escalating insurance premiums. Repose statutes, however, present probably the least desirable approach. The Note suggests that consideration be given first to improved insurance delivery mechanisms, reform of tax law to permit deductions for self insurance reserves, governmental encouragement of increased emphasis on safety systems, promulgation of improved benefit schedules for workmen's compensation claims in exchange for providing that it be established as the sole remedy for injured workers, and use of rebuttable presumptions based on determinations of a product's useful life. If new tort law defenses must then be considered, "state of the art," "misuse," and "later modification" defenses are to be preferred to repose statutes and will cut off most of the same claims.

¹⁶⁹Phillips, *supra* note 167, at 666. The author suggests that legislatures will wish to modify repose statutes to soften inequitable and inconsistent side effects. The author concludes that the many necessary modifications will destroy the vitality of what was an ill-considered approach in the first place. He notes problems in dealing with continuing duties, subsequently arising duties, cumulative injuries, warranties extending to future performance, contribution and indemnity, fraudulent concealment, wrongful death, and persons under a disability.

¹⁷⁰See *Fujioka v. Kam*, 514 P.2d 568, 571-78 (Haw. 1973) (finding owner of property denied equal protection of laws because architect and engineer granted immunity under Hawaii's repose statute); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 384, 225 N.W.2d 454, 455 (1975) (holding repose statute granting architects and builders immunity "denies other possible defendants equal protection of the laws, under the constitution of the United States"). *But see Skinner v. Anderson*, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 590 (1967) (holding architect-contractor repose statute violative of state constitutional prohibition against awarding privileges or immunities); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 201, 293 A.2d 662, 668 (1972) (holding the classification of defendants in its design-construction repose statute was not so restricted or unreasonable as to deny others equal protection guaranteed by the state constitution); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 532, 503 P.2d 108, 111 (1972) (holding construction repose statute not violative of state or federal equal protection guarantees because "the Washington provision is not limited as to vocation").

¹⁷¹In *Kallas Millwork Corp. v. Square D Co.*, 66 Wis.2d 382, 384, 225 N.W.2d 454, 455 (1975), the architect-builder repose statute was held unconstitutional under art. 1, sec. 9 of the Wisconsin Constitution because it "deprives a plaintiff of a remedy for a wrong that is recognized by the laws of the state," although the court did not rest its decision "on that aspect of possible unconstitutionality." *Id.* at 393, 225 N.W.2d at 460. In *Joseph v. Burns*, 260 Or. 493, 491 P.2d 203 (1971), the Oregon statute barring tort

been held to be an unreasonable legislative classification denying equal protection to owners and materialmen.¹⁷² Under the latter theory, plaintiffs barred before the accrual of their actions are denied a remedy guaranteed to all injured parties by the state constitution.¹⁷³

Analogizing to the products field, it might be argued that the protection of sellers by repose statutes denies third-party owners of products and premises an equal protection. As for denying injured plaintiffs a remedy, the Indiana Constitution states: "[E]very man, for injury done to him in his person, property or reputation, shall have remedy by due course of law."¹⁷⁴

Courts have split on the equal protection issue.¹⁷⁵ One court, that found such a violation in repose statutes, stated that had it not so found it could nevertheless have grounded plaintiff's relief on an unconstitutional denial of remedy.¹⁷⁶ A court, which found no equal protection violation because it found the architect-builder classification reasonable, held also that plaintiff was entitled to no remedy inasmuch as the repose statute *prevented her cause from ever arising*.¹⁷⁷

Another constitutional issue is raised by the following language in 5: "This section applies to all persons regardless of minority or legal disability. Notwithstanding Indiana Code section 34-1-2-5, any product liability action must be commenced"¹⁷⁸ Indiana Code section 34-1-2-5 provides that any person "may bring his action within two (2) years after the disability is removed."¹⁷⁹ Clearly, some plaintiffs under a disability may be barred under the statute before the removal of the disability, thus, perhaps, denying them due process or a state created remedy. In *Chaffin v. Nicosia*,¹⁸⁰ the Indiana Supreme Court rejected an equal protection argument that the 1941

actions after ten years from the act or omission complained of was upheld as not violative of the states' constitutional guarantee of a remedy for injury. "It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need [so that] there be an end to potential litigation." *Id.* at 503, 491 P.2d at 208.

¹⁷²Skinner v. Anderson, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 590 (1967); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 389-91, 225 N.W.2d 454, 458-59 (1975).

¹⁷³Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 384, 255 N.W.2d 454, 455 (1975).

¹⁷⁴IND. CONST. art. 1, § 12.

¹⁷⁵See note 170 *supra*.

¹⁷⁶Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 393, 225 N.W.2d 454, 460 (1975).

¹⁷⁷Rosenberg v. Town of North Bergen, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972).

¹⁷⁸IND. CODE § 33-1-1.5-5 (Supp. 1978).

¹⁷⁹*Id.* § 34-1-2-5 (1976).

¹⁸⁰310 N.E.2d 867 (Ind. 1974).

Indiana malpractice limitation statute created on its face an unreasonable classification favoring medical practitioners because it purported to cut off all claims, "unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."¹⁸¹ The court did hold, overruling a prior case,¹⁸² that interpreting the limitation as a repose statute would create an absurd result, and decided that the disability removal statute, Indiana Code section 34-1-2-5 provides a grace period coming

into play . . . after the medical malpractice statute has run To construe the medical malpractice statute as a legislative bar on all malpractice actions under all circumstances unless commenced within two years from the act complained of (discoverable or otherwise) would raise substantial questions under Article 1, § 12 guarantee of open courts and redress for injury to every man, not to mention the offense to lay concepts of justice.¹⁸³

Although section 5 of the chapter seeks to prevent the courts from construing this provision as anything but a repose statute, such legislative action would appear to invite a direct constitutional challenge under article 1, section 12.¹⁸⁴

One writer, when considering the repose cutoff of persons under disability, found their plight "little different from that of the competent person who is unable to assert a claim during the statutory period because an injury has not yet occurred . . . ; there is no reason to favor one situation over the other. The comparison points up the lack of wisdom of an outer cutoff approach."¹⁸⁵

¹⁸¹IND. CODE § 34-4-19-1 (1976).

¹⁸²Burd v. McCullough, 217 F.2d 159 (7th Cir. 1954), which held the medical malpractice statute and the legal disability statute were inconsistent and the former, therefore, repealed the latter. In *Chaffin*, the court said of this holding: "Of course, federal cases interpreting state law are merely persuasive . . . we do not deem them controlling on questions of Indiana law." 310 N.E.2d at 870.

¹⁸³310 N.E.2d at 870.

¹⁸⁴IND. CONST. art. 1, § 12. See also IND. CODE § 16-915-3-1 (1976). This special statute of limitations for minors under the Indiana Medical Malpractice Act of 1975 also applies to "all persons regardless of minority or other legal disability," although it also provides an injured child under six will have until its eighth birthday in which to file. This provision, therefore, appears subject to the same constitutional challenge as the new product liability statute of limitations.

One difference between the malpractice and the product liability limitation should be noted. The former may cut off undiscovered claims or claims not brought timely by guardians or other persons empowered to act for minors, but presumably the plaintiff will have suffered some actionable harm at the time of the medical procedure. Under the latter, no action may be even theoretically possible because the statute may have run before the party is injured.

¹⁸⁵Phillips, *supra* note 167, at 672.

8. *Constitutionality of the Product Liability Chapter.*—Public Law 141 was enacted “to amend [Indiana Code title] 33 concerning courts and court officers and product liability.”¹⁸⁶ The first twenty-seven sections of the Act are concerned with courts and court officers, the twenty-eighth with product liability.¹⁸⁷

Article 4, section 19, of the Indiana Constitution states: “Subject matter of acts.—An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one [1] subject and matters properly connected therewith.”¹⁸⁸ It would be difficult to construe any reasonable connection between *courts* and *product liability* so as to justify their inclusion under a single title.

In *State ex rel. Pearcy v. Criminal Court*,¹⁸⁹ an entire amendatory act was held void because it was found to embrace two subjects expressed in the title.¹⁹⁰ Clearly both the court provisions and the product liability chapter of public law 141 are subject to strong constitutional challenge. Although it might be argued that the Act’s severability clause¹⁹¹ might save one set of provisions if the other were successfully challenged, it seems clear that a finding of more than one subject in an act will at once void the act in *toto*.¹⁹² Until a constitutional challenge is successfully consummated, however, the product liability chapter remains Indiana law.

¹⁸⁶Act of Mar. 10, 1978, Pub. L. No. 141, 1978 Ind. Acts 1298.

¹⁸⁷*Id.*

¹⁸⁸IND. CONST. art. 4, § 19 (1851) (amended 1960 & 1974).

¹⁸⁹262 Ind. 9, 274 N.E.2d 519 (1971).

¹⁹⁰*Pearcy* was decided prior to the 1974 amendment. Under the provision of IND. CONST. art. 4, § 19, in force at that time, where more than one subject was embraced in the act itself, but only one subject was expressed in the act’s title, “such act, amendatory act or amendment of a code shall be void only as to so much thereof as shall not be expressed in the title.” In *Pearcy*, however, the amendatory act’s title, as well as the act itself, embraced two subjects. The court cited *Jackson v. State*, 194 Ind. 248, 142 N.E. 423 (1924) for authority to void the act in *toto*. 262 Ind. at 17, 274 N.E.2d at 523. The *Jackson* court had pointed out the impossibility of choosing between the subjects. 194 Ind. at 249, 142 N.E. at 426. One sentence from the original act was also challenged in *Pearcy* as foreign to the original title. That sentence alone was declared void. 262 Ind. at 18, 274 N.E.2d at 523. It was argued in *Pearcy* that the Act should be excepted under art. 4, § 19 because it purported to amend a code — the 1971 IND. CODE. The court held that the 1971 IND. CODE was not a code within the meaning of art. 4, § 19, but was rather a compilation. The court held that the 1971 IND. CODE was void inasmuch as it embraced various subjects, but that each act and amendatory act assembled under it would remain in effect although subject to attack under art. 4, § 19 if it was found to embrace more than one subject. 262 Ind. at 16, 274 N.E.2d at 522.

¹⁹¹IND. CODE § 33-1-1.5-7 (Supp. 1978).

¹⁹²IND. CONST. art. 4, § 19 (1851) (amended 1960 & 1974) eliminates the earlier title requirement. An act is to be confined to “one [1] subject and matters properly connected therewith.” This requirement would appear to apply directly to Public Law 141 unless it can be argued successfully that amendatory acts such as Public Law 141 are “revisions” within the meaning of the exception: “codification, revision or rearrange-

9. *Indemnity.*—Section 6 of the chapter states: “Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.”¹⁹³ This language probably conforms to past Indiana decisions concerning indemnity. For example, in *McClish v. Niagara Machine & Tool Works*,¹⁹⁴ the court reviewed Indiana law concerning the circumstances under which indemnity would be allowed. The *McClish* court stated as the general rule that, absent an express or implied contract, there was no right to indemnity or contribution among joint tortfeasors.¹⁹⁵ The court recognized, however, certain exceptions to the general rule: (1) Derivative liability—in which a principal or employer is held liable under the doctrine of respondeat superior; (2) constructive liability—in which one is held liable to a third person by operation of some special statute or rule of law which imposes a non-delegable duty upon one who is otherwise without fault; and (3) defective products—in which a supplier sells a defective product to a merchant who either does not know nor should have known of the defect in the product, and, thereafter, the merchant sells the product to the ultimate user who is injured by the defective product; under such circumstances, if the user recovers against the merchant, the supplier is liable to the merchant for those damages.¹⁹⁶ A later extension of *McClish* held that if the plaintiff, in addition to strict liability, alleges negligence on the part of the defendant, the defendant does not have an indemnity action against the supplier since the defendant is considered a joint tortfeasor.¹⁹⁷ Whether section 6’s language conforms to prior Indiana common law is a question open to interpretation by the courts.

10. *Conclusion.*—In attempting to deal with the serious economic problems raised by soaring product liability insurance premiums, the Indiana General Assembly has enacted a remedial statute marked by ambiguities, opaque definitions, incompleteness, inconsistencies, inequities, provisions subject to likely constitutional challenge, a general violation of the state constitution’s one subject rule, and general evidence of very hasty draftsmanship. The authors have sought to identify the chief problem areas, but certainly the overwhelming task of rationalizing this legislation and harmonizing

ment of laws” set forth in art. 4 § 19. “Revision” in this context, however, should be construed to have a specific meaning: “A revision contemplates a redrafting and simplification of the entire body of statute law” 82 C.J.S. *Statutes* § 271 (1953). Accordingly, revision must be distinguished from an amendment.

¹⁹³IND. CODE § 33-1-1.5-6 (Supp. 1978).

¹⁹⁴266 F. Supp. 987 (S.D. Ind. 1967).

¹⁹⁵*Id.* at 989.

¹⁹⁶*Id.* at 989-92.

¹⁹⁷*Wicks v. Ford Motor Co.*, 421 F. Supp. 104, 106 (N.D. Ind. 1976).

it with existing common law doctrines will be left to the judiciary. Inasmuch as a substantial part of insurance premium cost has been identified as arising out of the expense, delay, and uncertainty, of the tort litigation system, the legislature appears to have added a substantial load to this aspect of the problem instead of ameliorating it.

APPENDIX A TITLE 33 COURTS AND COURT OFFICERS

ARTICLE 1. GENERAL PROVISIONS

ch. 1.5. Product Liability.

33-1-1.5-1 Application of chapter

Sec. 1. This chapter shall govern all products liability actions, including those in which the theory of liability is negligence or strict liability in tort; provided however, that this chapter does not apply to actions arising from or based upon any alleged breach of warranty.

33-1-1.5-2 Definitions

Sec. 2. As used in this chapter:

“User or consumer” shall include: a purchaser; any individual who uses or consumes the product; or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question.

“Product liability action” shall include all actions brought for or on account of personal injury, disability, disease, death or property damage caused by, or resulting from, the manufacture, construction or design of any product.

“Physical harm” includes bodily injury, death, loss of services, and rights arising therefrom, as well as damage to property.

“Seller” includes a manufacturer, a wholesaler, a retail dealer or a distributor.

33-1-1.5-3 Codification and restatement of strict liability in tort

Sec. 3. Codification and Restatement of Strict Liability in Tort. The common law of this state with respect to strict liability in tort is codified and restated as follows:

(a) One who sells any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm thereby caused to the user or consumer or to his property if that user or consumer is in the

class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and, if:

(1) the seller is engaged in the business of selling such a product, and

(2) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(b) The rule stated in Subsection (a) applies although

(1) the seller has exercised all possible care in the preparation and sale of his product, and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

33-1-1.5-4 Defenses to strict liability in tort

Sec. 4. Defenses to Strict Liability in Tort.

(a) The defenses in this chapter are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense.

(b) With respect to any product liability action based on strict liability in tort:

(1) It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.

(2) It is a defense that a cause of the physical harm is a non-foreseeable misuse of the product by the claimant or any other person. Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

(3) It is a defense that a cause of the physical harm is a non-foreseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm.

(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.

33-1-1.5-5 Statute of limitations

Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years

after the delivery of the product to the initial user or consumer except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

33-1-1.5-6 Indemnity

Sec. 6. Indemnity. Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

33-1-1.5-7 Severability

Sec. 7. If a provision of this act or its application to a person or circumstances is held invalid, the invalidity does not affect other provisions or applications, and to this end the provisions of this act are severable.

33-1-1.5-8 Effective date; saving clause

Sec. 8. (a) Because an emergency exists, IC 33-1-1.5 takes effect June 1, 1978.

(b) IC 33-1-1.5 does not apply to a cause of action that accrues before June 1, 1978.

XIII. Professional Responsibility*

A. Lawyer Advertising

In response to the United States Supreme Court's decision in *Bates v. State Bar*,¹ which declared the Arizona ban against lawyer advertising to be a violation of the first amendment, the Indiana Supreme Court revised Canon 2 of the Code of Professional Responsibility.² The revisions, which became effective January 1, 1978,

*For a discussion of attorney-client privilege, see Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 51-52 (1978).

¹433 U.S. 350 (1977) (5-4 decision). For a discussion of this decision and its effect on lawyer advertising, see Kelso, *Professional Responsibility, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 219, 219-22 (1977).

²1978 IND. CT. R. 385. The Indiana Code of Professional Responsibility, adopted in 1971, [hereinafter cited as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility.

The Code contains Ethical Considerations [hereinafter referred to as ECs] representing the objectives toward which every member of the profession should strive, and Disciplinary Rules [hereinafter referred to as DRs], mandatory in character, that state the minimum level of conduct below which no lawyer can fall without becoming subject to disciplinary action.

were taken from the recommendations of the Indiana State Bar Association House of Delegates.³

Of the fourteen Ethical Considerations⁴ and five Disciplinary Rules⁵ changed by the supreme court's amendments, DR 2-101, which details advertising controls, is of particular interest to Indiana attorneys. The rule allows advertising in print media, including newspapers and telephone directories, and on radio.⁶ Restrictions on printed advertising preclude photographs and other pictorial matter and require that printed advertising be dignified and not contain "a false, fraudulent, misleading, deceptive, self laudatory or unfair statement or claim."⁷ In addition to the basic information about the attorney or firm,⁸ the advertisement may include rates and fees; however, this information, if included, must adhere to specific guidelines that describe the time period during which the lawyer is bound by the fee representation. A firm or lawyer may also indicate areas of practice, but cannot indicate a speciality other than the traditional areas of patent, trademark, and admiralty law.⁹

B. Solicitation

In recent companion cases, *In re Primus*¹⁰ and *Ohralik v. State Bar*,¹¹ the United States Supreme Court answered a question expressly reserved in *Bates* concerning constitutionally acceptable methods a lawyer may utilize to advise the public that legal counsel is available.¹² The cases involved lawyer solicitations, and the

³The State Bar recommendations conformed with the American Bar Association House of Delegates' proposals. See *House of Delegates Adopts Advertising Policy*, 21 RES GESTAE 486 (1977); *Indiana Supreme Court Adopts Lawyer Advertising Rules*, 22 RES GESTAE 14 (1978).

⁴ECs 2-2 to -5, 2-7, 2-8, 2-8(A), 2-8(B), 2-9, 2-9(A), 2-10, 2-10(A), 2-11, 2-14.

⁵*Id.* DR 2-101 to 105.

⁶Radio advertising may not include any background music or other sound effects and must be prerecorded, approved for broadcast by the lawyer, and retained by the lawyer. DR 2-101(B), (C). Television advertising is not authorized.

⁷DR 2-101(A).

⁸See DRs 2-101(B)(1) to (18).

⁹DR 2-105. For a discussion of lawyer's reaction to the new advertising rules, see *Is Advertising Laying an Egg? Lawyers May Be More Interested In Solicitation*, 64 A.B.A.J. 673 (1978). The article cites a LawPoll survey stating that only 3% of all lawyers have advertised since the decision in *Bates*, 89% do not plan on advertising, and, although 46% support advertising in theory, most find no practical need to advertise. For an analysis of lawyer advertising and specialization, especially as it relates to the Indiana attorney, see Staton, *Access to Legal Services through Advertising and Specialization*, 53 IND. L.J. 247 (1978).

¹⁰98 S. Ct. 1893 (1978).

¹¹98 S. Ct. 1912 (1978).

¹²Canon 2 of the Code provides: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available."

Supreme Court distinguished the two cases in order to establish that, in some situations, solicitation may be acceptable.

Primus concerned an attorney who, in cooperation with the American Civil Liberties Union (ACLU), had written a letter offering free legal counsel to a woman who had undergone a sterilization operation as a condition to continued "Medicaid" assistance. Although the letter itself prompted no litigation, the South Carolina Supreme Court found that *Primus* had violated the state's disciplinary rules because she had solicited legal business on behalf of the ACLU.¹³

On appeal, the United States Supreme Court, relying on its earlier decision in *NAACP v. Button*,¹⁴ held that a lawyer may offer free counsel by letter in potential litigation having political or ideological ramifications, and that it was a violation of the first and fourteenth amendments to interpret the Code of Professional Responsibility otherwise. In both *Primus* and *Button* the Court based its analysis on the premise that, although states have the power to regulate members of any licensed profession,¹⁵ if the act sought to be regulated involves an individual's freedom of association and expression, then the state must show a compelling and subordinating state interest.¹⁶ South Carolina's interests in prohibiting lawyer solicitation were to avoid the evil of a lawyer giving priority to her own personal and pecuniary interest rather than to her client's interest and to prohibit solicitation accompanied by coercion or overreaching.¹⁷ The Court felt that, in this case, *Primus* did not stand to gain monetarily from the litigation¹⁸ and that, since the solicitation was by mail, there was little chance of overreaching or coercion.¹⁹

Ohralik offered a solicitation situation on the other side of the spectrum from *Primus*. There were no first amendment rights of political expression or associational freedom involved in *Ohralik*. The solicitation was a purely commercial one, primarily motivated by the attorney's desire for his own pecuniary gain. *Ohralik*, seeking

¹³The South Carolina Supreme Court held that *Primus* violated DRs 2-103(D)(5)(a), (c) and 2-104(A)(5). 98 S. Ct. at 1898-99.

¹⁴371 U.S. 415 (1963).

¹⁵"The States enjoy broad power to regulate 'the practices of professions within their boundaries,' and '[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.''" 98 S. Ct. at 1899 (quoting *Goldfarb v. State Bar*, 421 U.S. 773, 792 (1975)). See also 371 U.S. at 438-39.

¹⁶98 S. Ct. at 1905 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)); 371 U.S. at 438.

¹⁷98 S. Ct. at 1908.

¹⁸*Id.* at 1903-04.

¹⁹*Id.* at 1906-07.

to be employed by two automobile accident victims, solicited one woman, Carol McClintock, in the hospital and the other woman in her home. At times, the attorney concealed a tape recorder under his raincoat. Both women were unsophisticated in legal matters and initially agreed to allow Ohralik to represent them in any matters resulting from the accident. Later, when they tried to discharge him, Ohralik sued for breach of contract and succeeded in reaching part of McClintock's damage award. Both women filed disciplinary charges against Ohralik with the county bar association. The Ohio State Supreme Court held that Ohralik had violated the disciplinary rules and subjected him to public reprimand and indefinite suspension.²⁰ The United States Supreme Court upheld this decision.

Justice Powell, writing for the Court in both *Primus* and *Ohralik*, distinguished the rights to be protected in each of the two situations. First, the Court considered the coerciveness of the method of solicitation. In *Primus*, the solicitation by letter allowed time for thought and reflection by the potential client. On the other hand, the *Ohralik* in-person solicitation, initiated less than two weeks after the accident, with a visit to one woman in a hospital room, may have exerted pressure without providing the recipient an opportunity for comparison or reflection.²¹ In comparing the *Ohralik* type of in-person solicitation to the type of solicitation by truthful advertising of routine legal services permitted in *Bates*, the Court noted that public advertising, which basically provides information to a person who is "free to act upon it or not"²² must be distinguished from an in-person solicitation where a prospective client may be distraught and easily influenced by a persuasive attorney.²³

Of equal, if not greater, importance was the distinction the Court made between the rights of political speech in *Primus* and the rights of commercial speech in *Ohralik*. The Court extends a lesser degree of protection to the rights of commercial speech,²⁴ thus, in *Ohralik* it applied low level scrutiny.²⁵ In reviewing the protection to be afforded Ohralik's commercial speech, the Court indicated that speech was merely a subordinate component of the activity involved. The Court upheld the traditional view that the state, through the bar, may regulate in-person solicitation for pecuniary gain and

²⁰98 S. Ct. at 1917. The Ohio Supreme Court held that Ohralik violated DRs 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility.

²¹98 S. Ct. at 1919.

²²*Id.*

²³*Id.* at 1923.

²⁴See 433 U.S. 350, 363-64; *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 758-61, 770-73 (1976), *Bigelow v. Virginia*, 421 U.S. 809, 818-26 (1975).

²⁵98 S. Ct. at 1918-19.

discipline a deviating attorney if there is potential harm to the client, regardless of whether any harm has in fact occurred.²⁶

C. Attorney Suit for Collection of Fees

The Code, in an Ethical Consideration states: "A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client."²⁷

In *Kizer v. Davis*,²⁸ however, the Indiana Court of Appeals, reasoning that the Ethical Considerations do not have the force and effect of either case law or statute,²⁹ allowed an attorney to bring suit against a client for fees even though his action was not consistent with EC 2-23. The lower court had stated that *but for* EC 2-23, the attorney would have been able to recover and the court, therefore, had denied the attorney's quantum meruit suit because he failed to show that he had been a victim of fraud or the object of flagrant client imposition. The court of appeals rejected this reasoning, stating that the trial court had interpreted the law incorrectly.³⁰ Although the Ethical Considerations and Disciplinary Rules are evidence of the proper standard of conduct for the legal profession, the Ethical Considerations are not compulsory and the Disciplinary Rules operate as rules of law only in matters of attorney discipline. The court concluded that EC 2-23 was never intended to be a rule of law and, therefore, could not be applied to bar an action for collection of fees.³¹ The attorney would only be subject to disciplinary ac-

²⁶*Id.* at 1922-24. The dissent in *Primus* stated that the two cases are not distinguishable: "I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved." 98 S. Ct. at 1911 (Rehnquist, J., dissenting). Further, Justice Rehnquist said that the solicitation in *Primus* involved the same degree of potential harm to an unsuspecting or unsophisticated lay person as the solicitation in *Ohralik* and that the states are not violating the United States Constitution by regulating conduct which involves uninvited solicitation on an individual basis. *Id.* at 1909-10 (Rehnquist, J., dissenting).

²⁷EC 2-23.

²⁸369 N.E.2d 439 (Ind. Ct. App. 1977).

²⁹*Id.* at 444.

³⁰*Id.*

³¹*Id.* at 444-45. The Indiana State Bar issued an opinion which considered the rights of attorneys in disputes or potential disputes over fees with clients. Opinion Number Five of 1977 states: (1) An attorney does not have an automatic retaining lien on his client's papers and must consider the ethical aspects of their retention, and (2) in certain circumstances, an attorney may be acting unethically if he refrains from accepting employment for the sole reason that the prior lawyer has not been paid. *Attorneys and Their Ethics*, 21 RES GESTAE 528 (1977).

tion if DR 2-106 was breached by a demand for a fee which proved to be "illegal or clearly excessive."³²

D. Withdrawal of Counsel

In *Ashbrook v. Ashbrook*,³³ the court of appeals held that an attorney may withdraw from a case when a conflict of interest exists, even though his request is untimely and granted over objection.³⁴ In *Ashbrook* an attorney, Hooper, had served both as counsel to the husband in a divorce proceeding and as co-commissioner of a partition sale of real property which was jointly owned by Ashbrook and his wife. After the sale, Ashbrook, as purchaser, concluded that improprieties had occurred which would warrant having the sale modified or set aside. After Ashbrook complained to Hooper concerning the sale, Hooper refused to contest the sale³⁵ but made no effort to withdraw as Ashbrook's attorney.

Prior to the hearing to determine distribution of the proceeds of the sale, Ashbrook hired another attorney, Pactor, to represent him. Subsequently, Pactor filed both a petition to modify or set aside the sale and a motion for a continuance of the hearing. The court denied the motion for continuance. At the hearing, Hooper was granted formal permission to withdraw from the case, but Pactor was again denied a continuance.

The court of appeals reasoned that, while Hooper had an affirmative duty to withdraw,³⁶ the tardiness of Hooper's withdrawal had been detrimental to his client.³⁷ The court determined Hooper's withdrawal on the day of the hearing was good cause for a continuance to be granted in order to allow the new attorney an opportunity to prepare for trial.³⁸ The court of appeals held that the trial court had abused its discretion by not allowing a continuance; the case was reversed and remanded.³⁹

³²369 N.E.2d at 444.

³³366 N.E.2d 667 (Ind. Ct. App. 1977).

³⁴*Id.* at 672.

³⁵Hooper was "placed in the perplexing position of being asked to challenge a partition sale for which he served as . . . co-commissioner . . ." *Id.* at 671.

³⁶*Id.* Because of the animosity that had developed between Hooper and Ashbrook and the incongruous nature of the roles which had devolved upon Hooper, the court agreed with Hooper's duty to withdraw. *Id.*

³⁷*Id.* The court cited EC 2-32 which states that when an attorney justifiably withdraws he must endeavor to protect the interest of his client. *Id.*

³⁸IND. R. TR. P. 53.4 provides in part: "Upon motion, trial may be postponed or continued in the discretion of the court, and shall be allowed upon agreement of all the parties or upon a showing of good cause established by affidavit or other evidence." (Emphasis added).

³⁹366 N.E.2d at 672.

E. Enforcement of the Code

During the survey period, the Indiana Supreme Court decided five cases in the area of lawyer discipline. As a result of these decisions, two attorneys were suspended and three attorneys were disbarred.⁴⁰

1. *Suspensions.*—The two cases which resulted in the disciplinary action of suspension included situations in which the attorneys failed to represent their clients competently and zealously by neglecting legal matters entrusted to them. *In re Turner*⁴¹ involved three separate situations: a workmen's compensation claim, a breach of contract suit, and a bankruptcy petition. The *Turner* attorney had neglected his duty to timely file the proper papers and fraudulently advised his clients as to the status of their respective claims.⁴² *In re Snyder*⁴³ involved situations in which the attorney failed to timely file a bankruptcy petition and neglected to file a discrimination suit after he had assured his client that such a suit had been filed.⁴⁴ In both cases the sentence was suspension from the practice of law for not less than two years.⁴⁵ In *Turner*, the court recognized that although the attorney's acts were a serious violation of the Code of Professional Responsibility, there were mitigating circumstances which included the attorney's high degree of skill, respect within the community, and recent personal hardship.⁴⁶ In both *Turner* and *Snyder*, the court emphasized the need for trust between lawyer and client and the duty of an attorney to be conscientious and deliberate in the handling of all legal matters agreed to be performed. The court's concern in regard to an attorney's un-

⁴⁰The Indiana Disciplinary Commission's Annual Report for the period covering October 1, 1976, to June 30, 1977 (a shortened period due to a change in the fiscal year), appears in the period in INDIANA STATE BAR ASSOCIATION, INDIANA SUPREME COURT DISCIPLINARY COMMISSION ANNUAL REPORT, *reprinted in* 22 RES GESTAE 532 (1977). The summary of the Commission's activities shows that of 274 Requests for Investigations filed during the period the majority involved actions for collection, criminal matters, divorce matters, tort matters, and wills and estates. The most common complaint lodged against a practicing attorney was neglect or failure to communicate with the client. Disciplinary action imposed by the supreme court included two private reprimands, two suspensions, and four disbarments; two reinstatements were allowed.

⁴¹366 N.E.2d 166 (Ind. 1977).

⁴²The supreme court held Turner violated DRs 1-102(A)(4)-(6), 6-101(A)(3), and 7-101(A)(1)-(3). *Id.* at 167-68.

⁴³370 N.E.2d 899 (Ind. 1977), *modified on rehearing*, 373 N.E.2d 1108 (Ind. 1978).

⁴⁴The supreme court held Snyder violated DRs 1-102(A)(4)-(5), 6-101(A)(3), and 7-101(A)(1)-(3). *Id.* at 900-01.

⁴⁵Upon rehearing and review, the period of suspension in *Snyder* was modified by the supreme court to not less than one year. 373 N.E.2d 1108 (Ind. 1978).

⁴⁶366 N.E.2d at 168.

conscientious conduct as represented in these two cases was emphasized by the *Snyder* holding which characterized such conduct as leading to "the tarnishing of the entire legal profession."⁴⁷

2. *Disbarments.*—In the three situations which resulted in the severe sanction of disbarment, the supreme court found the conduct of the attorneys to be extremely grievous, causing irreparable harm to the entire legal profession.

In *In re Vincent*,⁴⁸ the attorney was found guilty of neglecting legal matters entrusted to him by intentionally failing to carry out a contract of employment, by drafting a title insurance policy which was intended to, and, in fact, did mislead the insured, by commingling of a client's funds with personal funds, and by using a client's funds to pay a personal debt.⁴⁹ Although the attorney admitted that he had violated the Code and had committed these acts, he defended himself on the grounds that his diminished physical and mental well-being, which resulted from health problems and alcoholism, had forced him to unintentionally neglect legal matters "during the crucial period."⁵⁰ The supreme court determined from the facts that, contrary to the attorney's claim, at least as far as the matter of the title insurance policy was concerned, there had been a conscious effort to mislead. Regardless of the cause of the neglect, the supreme court declared: "[T]his Court must safeguard the public from unfit attorneys, whatever the cause of the unfitness may be."⁵¹

In re Wireman,⁵² a case in which the attorney asserted numerous procedural errors, provided the supreme court with an opportunity to reaffirm its position that, in a disciplinary hearing, due process requires only that procedures be complied with in substance and not necessarily in the exact form required by the procedural rules. Assuming there has not been strict procedural compliance by the complainant,⁵³ an attorney may still be subject to discipline

⁴⁷370 N.E.2d at 902.

⁴⁸374 N.E.2d 40 (Ind. 1978).

⁴⁹The supreme court held that Vincent violated DRs 1-102(A)(4)-(5), 6-101(A)(3), 7-101(A)(2)-(3), and 9-102(A). *Id.* at 42-44. Opinion Number Four of 1977 issued by the Indiana State Bar Association considered the question of commingling funds where the monetary advances of all clients were put into a general account from which any attorney in the firm could withdraw money for personal use. The association held that the Code, in DR 9-102(A), mandates separation of funds and as such the firm's procedure was considered unethical. *Attorneys and Their Ethics*, 22 RES GESTAE 402 (1977).

⁵⁰374 N.E.2d at 43.

⁵¹*Id.*

⁵²367 N.E.2d 1368 (Ind. 1977), cert. denied, 98 S. Ct. 2234 (1978).

⁵³*Id.* at 1370. The court noted, however, that if there is a deviation from the disciplinary rules' time standards, which would destroy the fundamental fairness of the disciplinary process, then a dismissal of all charges may be warranted. *Id.*

when the attorney has been given notice of charges and an adequate opportunity to be heard.⁵⁴ The *Wireman* attorney was charged with six separate counts of misconduct. Four of these counts involved situations in which the attorney, who was also a city court judge, presided at judicial proceedings involving parties he had formerly counseled as an attorney. He had neither disqualified himself nor informed the parties that they could request a change of judge. The court found this conduct to be a violation of the codes of Professional Responsibility and Judicial Conduct:⁵⁵ "He has blurred the function of an attorney into his acts as a judicial officer."⁵⁶ In additional counts, the attorney was found to have influenced judicial decisions and to have encouraged the theft of property which he subsequently purchased. In order to protect the public, preserve the integrity of the bar, and show the court's "total abhorrence" to the grievous nature of the attorney's conduct, the court imposed the maximum disciplinary sanction of disbarment.⁵⁷

Five separate counts of misconduct were found in *In re DeWitt*,⁵⁸ in which the attorney was held to have neglected legal matters entrusted to him. DeWitt was accused of acting in a fraudulent and deceitful manner, failing to seek the lawful objectives of a client, misrepresenting legal matters, failing to carry out a contract of employment, failing to preserve the identity of a client's funds, and appropriating client's funds to his own benefit.⁵⁹ The attorney did not appear at the hearing, and the court found no circumstances which might mitigate such "extremely grave" conduct. "The respondent has not merely transgressed the disciplinary rules; his conduct appears deliberate and without extenuation."⁶⁰

⁵⁴*Id.* at 1369-70. The court relied on and quoted its earlier opinion in *In re Murray*: "The complaint filed by the Disciplinary Commission in all disciplinary cases is predicated on the grievance filed, but it would be absurd to hold that the grievance must be strictly construed, and the complaint must be narrowly limited to the charges specified in the grievance . . ." *Id.* (quoting 362 N.E.2d 128, 130 (Ind. 1977)).

⁵⁵The supreme court held *Wireman* violated DRs 1-102(A)(3)-(6), 7-105, and 9-101(A), (C) of the Code as well as Canon 1 of the Code of Judicial Conduct, as then in effect. 367 N.E.2d at 1374-75.

The Code of Judicial Conduct and Ethics was adopted March 8, 1971, by the supreme court. The court amended the Code and changed the name to the Indiana Code of Judicial Conduct, effective January 1, 1975.

⁵⁶367 N.E.2d at 1376.

⁵⁷*Id.*

⁵⁸374 N.E.2d 514 (Ind. 1978).

⁵⁹The supreme court held DeWitt violated DRs 1-102(A)(3)-(4), (6), 6-101(A)(3), 7-101(A)(1)-(3), and 9-102(A). *Id.* at 518.

⁶⁰*Id.*

F. Professional Responsibility Problems in Criminal Cases

1. *Impropriety of Trial Judge.*—In *Brannum v. State*,⁶¹ the supreme court held that a trial judge's evaluative comments, expressing an opinion, were so violative of Canon 8 of the Code of Judicial Conduct⁶² and prejudicial to the trial of the defendant that the case was reversed and a new trial ordered. In this case the judge had imposed his views by (1) implying that a venireman was weak and perhaps mistaken if he refused to give a life sentence for first degree murder, (2) commenting on the credibility of an important witness' testimony as well as improperly denying a defense witness the opportunity to take the stand, and (3) giving special instructions to the jury while they were deliberating. These instructions seemed to emphasize particular legal issues being considered and, thereby, influenced the jury's decision. The court held the judge's intervention in any one of these three situations alone would have been reversible error. It is the responsibility of the judge, the court emphasized, to remain impartial and insure that the proceedings are conducted properly. Society has given to the prosecuting attorney the responsibility of bringing forth the evidence, and to the jury the duty of making the ultimate decision as to the guilt or innocence of the defendant. A jury of laymen, however, could be easily influenced by the comments made by an awesome, imposing judge.⁶³

2. *Prosecutorial Misconduct.*—The supreme court in *Craig v. State*⁶⁴ considered, *inter alia*, four statements made by the prosecutor during closing argument to which the defendant raised objections on appeal. Two of the statements, the court held, were improper and not consistent with the Code of Professional Responsibility. The prosecutor's reference to "the perjured testimony of some of the defense witnesses,"⁶⁵ was considered by the court to be improper since it inferred that the prosecutor had "inside" knowledge as to the credibility of the witnesses. DR 7-106(C)(4) states: "[A] lawyer shall not . . . assert his personal opinion . . . as to the credibility of a witness."⁶⁶ The statement was not a sufficient basis for reversal, however, since the court concluded that it did not subject the defendant to grave peril.

⁶¹366 N.E.2d 1180 (Ind. 1977).

⁶²See note 64 *supra*.

⁶³366 N.E.2d at 1182.

⁶⁴370 N.E.2d 880 (Ind. 1977).

⁶⁵*Id.* at 883.

⁶⁶EC 7-24 and the ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTORIAL FUNCTION § 5.8(b) (Approved 1971 Draft) concur with this situation.

Also held to be improper was the prosecutor's statement that it was his responsibility to represent society as a whole, including the accused, thus, placing a duty on him to present evidence both as to the guilt and innocence of the defendant. While the court agreed that the prosecutor had a duty to the entire community, it stated that it was incorrect and misleading for the prosecutor to emphasize his position as a public servant to obtain unfair advantage in a criminal trial. Failure to preserve the error by making an objection at trial prevented reversal, although the court asserted: "This line of argument by the prosecutor was highly improper."⁶⁷

3. *Claims of Incompetent Counsel.*—In reviewing an appeal from a denial of post conviction relief, based on allegations that the defendant had not received effective assistance from counsel, the Indiana courts use a standard different from the one used to determine misconduct under the Code. Under the Code, *any* conduct which violates a disciplinary rule is grounds for discipline.⁶⁸ The supreme court stated the standard in *Lenoir v. State*:⁶⁹

In a post conviction hearing . . . when incompetency of counsel is alleged, there is a presumption that an attorney has discharged his duty fully The presumption of competency is overcome only by showing that what the attorney did, or did not do, made the proceedings a mockery and shocking to the conscience of the court.⁷⁰

In *Lenoir*, the defendant had been found guilty of committing a felony while armed. He alleged that the trial counsel had been incompetent in failing to call two witnesses to testify. The court held that the testimony of these two witnesses would have been cumulative and impeaching only, and it was unlikely that calling them would have produced a different result. Denying the appeal, the court stated that the allegations of incompetency were unfounded since the attorney's failure to call the witnesses might well have been a matter of strategy.⁷¹

Similarly, in *Grimes v. State*,⁷² the court followed the same standard in denying an appeal based, *inter alia*, upon a claim that

⁶⁷*Id.* at 884. See EC 7-13; ABA STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTORIAL FUNCTION § 1.1 (Approved 1971 Draft).

⁶⁸See IND. R. ADMISS. & DISCP. 23(2)(a).

⁶⁹368 N.E.2d 1356 (Ind. 1977).

⁷⁰*Id.* at 1357-58. Federal courts use a different standard to measure incompetency of counsel. The test is whether counsel's performance met "a minimum standard of professional representation." United States *ex rel* Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976).

⁷¹368 N.E.2d at 1358.

⁷²366 N.E.2d 639 (Ind. 1977).

counsel had been ineffective by failing to inform the defendant correctly as to the nature of his plea with the result that his guilty plea to second degree murder was not voluntary and intelligent and, further, was the product of coercive threats suggesting possible use of the electric chair upon conviction. The court stated that, by alleging that his guilty plea was not voluntary, knowing, and intelligent, the defendant had raised constitutional questions and, therefore, "the burden of proof by a preponderance of the evidence is relaxed, and petitioner is permitted to withdraw his guilty plea if he raises a reasonable doubt on the issues of his counsel's effectiveness."⁷³ Looking to the record, the court concluded that the defendant had received adequate counsel and that, although the interviews with the attorney may have been minimal, it did not appear that the defendant had been coerced or that more time in consultation with the attorney would have brought about a different result.⁷⁴

FRANCES J. HONECKER

XIV. Property

*Debra A. Falender**

Several cases involving property rights were decided during the survey period. The most significant cases¹ are discussed under the

⁷³*Id.* at 641.

⁷⁴*Id.* at 641-42. The Indiana State Bar Association in Opinion Number Two considered a plea bargaining agreement form in which the defense attorney must state that he believed the defendant to be guilty of the crime confessed. Such an assertion by an attorney is inconsistent with DR 7-106(C)(3) which provides that an attorney should not state his personal opinion as to the guilt or innocence of the accused. *Attorneys and Their Ethics*, 22 RES GESTAE 234 (1977).

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¹A case worthy of note, but not discussed in the text, is *In re Guardianship of Fowler*, 371 N.E.2d 1345 (Ind. Ct. App. 1978). In *Fowler*, the court of appeals restated and applied the rule established in *Teegarden v. Lewis*, 145 Ind. 98, 40 N.E. 1047 (1895), that the mental capacity required to make a valid inter vivos gift is the same capacity as that required to make a valid will.

In addition to the judicial developments during the survey period, one legislative development is worthy of note. The legislature recently amended the statutes regarding the powers and duties of notaries public. See IND. CODE §§ 33-16-2-1 to 9 (1976 & Supp. 1978). A notary not only must affix his name, expiration date, and seal to a notarized document, as required under prior law, *id.* §§ 33-16-2-4, -3-1 (1976), but also "must print or type his name immediately beneath his signature" (unless his name is

following general headings: (1) Landlord and tenant, (2) real estate transactions, (3) real estate brokers, (4) easements, (5) zoning, and (6) eminent domain.

A. *Landlord and Tenant*

This year, in *Rauch v. Circle Theatre*,² the Indiana Court of Appeals recognized the right of a lessor to sue for damages for lessee's anticipatory breach of a lease. *Rauch* involved the alleged breach of a lease involving the Indiana Theatre building in Indianapolis. The lease, executed in 1926, was to run until the year 2015. From 1938 until 1968, the lessee, Circle Theatre Company, entered into management contracts with the Greater Indiana Amusement Company for operation of a theatre on the leased premises. On August 22, 1968, lessee assigned its rights under the lease to the management company.³ Lessee then instituted voluntary corporate dissolution proceedings and liquidated its other assets.⁴

already printed on the document or is part of his stamp) and must "indicate his county of residence on the document." *Id.* § 33-16-2-9(a) (Supp. 1978). A notary's failure to print his name or indicate his county of residence will not "affect the validity of any document notarized before July 1, 1982." *Id.* § 33-16-2-9(b). But see Act of Apr. 21, 1977, Pub. L. No. 34, § 4, 1977 Ind. Acts 222, effective January 1, 1978, in which the requirement of indicating the county of residence was established without a similar clause saving the validity of documents notarized without such an indication. Arguably, notarizations lacking the notary's county of residence, made between January 1, 1978, and the effective date of the new statute, are invalid.

²374 N.E.2d 546 (Ind. Ct. App. 1978). One other landlord-tenant case, *Tastee-Freez Leasing Corp. v. Milwid*, 365 N.E.2d 1388 (Ind. Ct. App. 1977), is worthy of note because it points out the importance of verifying that an annual rental figure stated in a lease is consistent with the stated monthly rent. In *Milwid*, the lease, prepared by lessor, stated that the "minimum annual rental" was \$7,500 payable in monthly installments of \$781.25. The annual rental would have been \$9,375 if the stated monthly rental were extended over a twelve-month period. Even though lessees paid \$781.25 per month, the trial court found that the intended rent was \$7,500 per year, or \$625 per month. The court of appeals affirmed the trial court's judgment that lessees were not in default for nonpayment of rent. *Id.* at 139. Lessees had, in fact, overpaid. It is interesting to note that lessor practically proved lessee's case. Lessor's ledger sheets denominated \$625 as rent and \$156.25 as an override. At trial, lessor did not explain the ledger accounts.

³The *Rauch* court cogently discussed the liability of the lessee and the assignee by reason of privity of estate and privity of contract. *Id.* at 549-50. The court held that the assignment of the lease did not abrogate lessee's liability, by reason of privity of contract, for rent and other lease covenants. For further discussion of this issue, see Townsend, *Secured Transactions and Creditors' Rights, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 289, 317 (1978).

⁴Eventually, lessee distributed \$475,145 to its shareholders, retaining \$122,000 in escrow to cover dissolution expenses. Of these assets, \$325,000 was derived from lessee's sale of its interest in the theatre.

In 1970, lessors sued lessees for damages,⁵ alleging that the dissolution of lessee corporation was an anticipatory breach of the lease. After a bench trial, lessors were denied relief. Although the court of appeals affirmed the judgment on the ground that the lessors proved no damages resulting from the anticipatory breach,⁶ the court held that an anticipatory breach had occurred when lessee liquidated its assets with the intent to completely and finally terminate its business enterprise.⁷ The *Rauch* court stated:

While there seems to be little Indiana law directly on point, the general rule allows a lessor an election of remedies upon a repudiation of the lease by the lessee. In such a situation, the lessor may elect to either (1) treat the lease as having been terminated and recover damages for breach of contract; or (2) treat the repudiation as a notice of intent to vacate by the lessee and file successive actions to recover each rental payment as it becomes due. 49 Am.Jur.2d *Landlord and Tenant* § 178 (1970). Where the lessor has elected to terminate a lease, his measure of

⁵Lessors also sought the appointment of a receiver for the preservation of lessee's assets and an injunction restraining the Indiana Secretary of State from issuing a certificate of dissolution. Lessors argued that "adequate provision" had not been made for all "debts, obligations and liabilities of the corporation," IND. CODE § 23-1-7-1(b)(4) (1976), because of the lessee's rental obligation for the remaining term of the lease.

⁶374 N.E.2d at 553. The court noted that the assignee had performed all the covenants in the lease, including the covenant to pay rent. The court also noted that the assignee was "a solvent corporation with assets of equal or greater value than that of Lessee and with a superior ability to manage and operate the leased premises." *Id.* The court held that lessors failed to prove any injury resulting from the breach. *Id.* Lessors argued that, to insure full performance of the lease by the assignee, the court should appoint a receiver to collect from lessee and hold in escrow the present value of all future rentals, taxes, and maintenance expenses due under the lease. The court of appeals responded: "While such an arrangement may offer some surface logic, we think that, as a practical matter such a remedy would be grossly inequitable for all parties concerned, particularly when considering the extended period of time for which the lease is to continue (until the year 2015)." *Id.* at 552.

⁷*Id.* Relying on authority from other states, the court ruled that a voluntary dissolution "does not of itself constitute a breach of the lease." *Id.* at 551. Rights and liabilities under a lease inure to the benefit of the shareholders of the corporate lessee. A breach of the lease would not necessarily occur if, upon dissolution, "the stockholders or other persons who are in equity entitled to the property of the corporation step into the shoes of the corporate lessee with the same rights and liabilities in respect to the lease as attached to the corporate lessee." *Id.* (quoting 49 AM. JUR. 2d *Landlord and Tenant* § 997 (1970)). In *Rauch*, lessee "intended the assignment and dissolution to be a complete and final termination of its business enterprise rather than a mere change in its form or structure." 374 N.E.2d at 552. Thus, a breach occurred upon dissolution because the "corporation was voluntarily placing itself in a position in which it could not perform its obligations" under the lease. *Id.*

damages will normally be the difference between the rent reserved in the lease for the unexpired term of the lease and the reasonable rental value of the premises for that term or the actual rent procured by a subsequent reletting. 49 Am.Jur.2d, *supra*.⁸

In holding that a lessor may sue at once when lessee anticipatorily repudiates a lease and may recover damages for breach of the entire lease,⁹ the court of appeals has finally completely recognized the applicability of contract principles in the landlord-tenant situation.¹⁰ The only problem with the decision of the *Rauch* court is that it does not mention two recent cases, *Roberts v. Watson*¹¹ and *Booher v. Richmond Square, Inc.*,¹² both of which rejected the anticipatory repudiation doctrine as inapplicable in the landlord-tenant context.¹³

⁸374 N.E.2d at 552.

⁹If the lease is for so long a period of time that an award of damages for the entire period would be arbitrary and speculative, the court would allow damages for a more limited time. *Id.* (citing *Hawkinson v. Johnston*, 122 F.2d 724 (8th Cir. 1941)).

¹⁰Under the traditional view that a lease was a conveyance of an interest in land, the contract doctrine of mitigation of damages was not applied. Lessor could remain idle and sue for rent installments as they came due. See Krieger & Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV. 591, 637 (1977), and authorities cited therein. Indiana law now requires that a lessor mitigate damages upon lessee's abandonment. See also *State v. Boyle*, 344 N.E.2d 302 (Ind. Ct. App. 1976); *Hirsch v. Merchants Nat'l Bank & Trust Co.*, 336 N.E.2d 833 (Ind. Ct. App. 1975), noted in Polston, *Property*, 1976 Survey of Recent Developments in Indiana Law, 10 IND. L. REV. 297, 302 (1976). Under the traditional common law view, a lessor could not use the contract doctrine of anticipatory repudiation on the theory that the covenant to pay rent was not an enforceable obligation until the rent payment was actually due. See Krieger & Shurn, *supra*, at 638-39. The *Rauch* decision now makes the contract doctrine applicable in lease situations.

¹¹359 N.E.2d 615 (Ind. Ct. App. 1977), noted in Falender, *Property*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 232, 233 (1977).

¹²310 N.E.2d 89 (Ind. Ct. App. 1974), noted in Polston, *Property*, 1974 Survey of Recent Developments in Indiana Law, 8 IND. L. REV. 228, 228 (1974).

¹³In both cases, the court stated that a landlord may not recover rent which is not alleged to be due. 359 N.E.2d at 621; 310 N.E.2d at 91. *Booher*, however, is consistent with *Rauch*, because in *Booher* the lessor chose the option to recover rent as it became due. The specific holding of the *Booher* court was that a prior action for rent was not res judicata as to a subsequent action for rent which became due after the commencement of the prior suit. In *Roberts*, however, the lessor sued for the total rent owing under a five-year lease. The court held that the lessor could recover only the rent due, but unpaid, at the time the suit was filed. *Roberts* and *Booher* are not distinguishable from *Rauch* in any significant respect. In *Roberts* and *Booher*, the lessees were both individuals who abandoned the premises. The individuals theoretically would be available to defend later suits for rent, unlike the dissolved corporation in *Rauch*. Abandonment might be considered a more equivocal act of repudiation than corporate dissolution. In any event, if the *Rauch* court intended that its decision be reconcilable with the *Roberts* decision, it seems that the *Rauch* court would have referred to *Roberts* and would not have made such broad statements about the lessor's option.

Presumably, inconsistent statements in these cases were impliedly overruled by the *Rauch* decision.¹⁴

B. Real Estate Transactions

Several cases were decided, during the survey period, involving real estate contracts.¹⁵ In *American Turners of South Bend v. Rodefer*,¹⁶ the purchaser deposited \$10,000 as earnest money in connection with an offer to buy vendor's real estate. The offer was expressly conditioned on "Purchaser's ability to secure . . . a firm commitment for a mortgage loan in an amount not less than One Hundred Six Thousand Dollars (\$106,000.00) to be amortized monthly over a period of not less than 10 years. Purchaser agrees to make a good-faith effort to obtain said mortgage."¹⁷ The offer was accepted, and purchaser applied for a mortgage loan. The loan application was made in the names of purchaser and his wife, but the wife did not sign either the offer or the application. A loan to purchaser and his wife, in the amount of \$106,000 for fifteen years at eight percent interest with monthly payments was approved, but purchaser's wife refused to sign the mortgage. The purchaser talked to others about financing the purchase, but did not at any time seek a mortgage loan in his name alone.

Purchaser notified vendor two days before the scheduled closing that he would not go through with the sale. The purchaser later brought an action to recover his earnest money deposit, alleging that he was unable to secure mortgage financing. The trial court granted purchaser's motion for judgment on the evidence and

The *Rauch* court instead cited 49 AM. JUR. 2d *Landlord and Tenant* § 178 (1970), which states, in general terms, that an unequivocal repudiation will support an immediate action for damages for breach of the entire lease. It seems that abandonment by an individual lessee may often be as unequivocal as assignment by and dissolution of a corporate lessee.

¹⁴The situation cannot be characterized as one in which there is a divergence of authority among the districts of the court of appeals. *Rauch*, *Roberts*, and *Booher* were all decided by the same three judges of the First District of the Indiana Court of Appeals.

¹⁵In addition to cases discussed in the text, see *Blaising v. Mills*, 374 N.E.2d 1166 (Ind. Ct. App. 1978) (court ordered reconveyance of property where prior conveyance to husband was procured by undue influence); *Randolph v. Wolff*, 374 N.E.2d 533 (Ind. Ct. App. 1978) (summary judgment improper where genuine issue of material fact existed as to construction of sale contract containing an ambiguous property description). A case of particular note to anyone involved in real estate law is *Prudential Ins. Co. v. Executive Estates, Inc.*, 369 N.E.2d 1117 (Ind. Ct. App. 1977), discussed in *Townsend*, *supra* note 3, at 292. Recent cases involving a broker's right to a commission are reviewed at notes 33-63 *infra* and accompanying text.

¹⁶372 N.E.2d 516 (Ind. Ct. App. 1978).

¹⁷*Id.* at 518.

ordered the return of his \$10,000. The court of appeals reversed, stating that, because the evidence would support an inference that purchaser did not act in good faith in trying to obtain a mortgage loan, the issues of purchaser's ability to obtain a loan and of his good faith should not have been taken from a jury.¹⁸

In *Finley v. Chain*,¹⁹ the court of appeals, for the first time in Indiana, discussed the rights of a vendor under a long-term land contract to recover damages from the purchaser in possession on a theory of waste.²⁰ The court noted that the vendor has an interest in real property analogous to that of a mortgagee.²¹ The court held that the purchaser in possession, like the mortgagor in possession, may use and enjoy the property in any manner,²² even to the extent of committing acts or omitting acts which might be considered waste,²³ so long as he does not "render unsafe the security for the remaining debt."²⁴ The vendor may not recover damages merely because the purchaser's active or permissive waste diminished the value of the property securing the purchase price.²⁵ Vendor's recovery is limited to the amount that the waste impairs the value of the vendor's security. Apparently, then, vendor can recover only if, and to the extent that, the purchaser has, by active or permissive waste, allowed the value of the property to fall below the balance of the purchase price owed to vendor.²⁶

¹⁸*Id.* at 519. Compare *Rodefer* with *Blakely v. Currence*, 361 N.E.2d 921 (Ind. Ct. App. 1977), noted in *Bepko, Contracts, Commercial Law, and Consumer Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 100, 100-01 (1977), and in *Falender, Property, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 232, 241 (1977).

¹⁹374 N.E.2d 67 (Ind. Ct. App. 1978).

²⁰The court stated: "Waste is the destruction, misuse, alteration, or neglect of the premises by one lawfully in possession to the prejudice of an estate or interest therein of another." *Id.* at 77. The action is an action in tort. *Id.*

²¹*Id.* (citing numerous authorities). The purchaser, like the mortgagor, is the owner of the land for all purposes, while the vendor retains legal title as security for the purchase money, in the same way that a mortgagor holds a mortgage as security for a debt.

²²The parties to the real estate contract may, as may mortgagor and mortgagee, specify reasonable and unreasonable uses of the property.

²³Waste may result from omission to do what is necessary to prevent injury (permissive waste) as well as from acts which cause injury (active waste). *Id.* at 79.

²⁴*Id.* at 78. The court disagreed with the position of some authorities that the mortgagee (or vendor) can never recover for damages resulting from permissive waste. See *id.* at 79 & n.7.

²⁵The court noted that, in title theory jurisdictions where the mortgage is considered a conveyance of legal title to the mortgagee, "remedies against waste arise when the damage lessens the value of the plaintiff's estate." *Id.* at 78 n.6.

²⁶For further discussion of *Finley*, see *Townsend, supra* note 3, at 296-97. Professor Townsend refers to this case as the "leaky spigot case." The court decided that the vendor could recover damages for the purchaser's failure to repair leaky faucets if, on

In *Brademas v. Real Estate Developments Co.*,²⁷ the court of appeals affirmed the trial court's decision that the vendor under a real estate sale contract is not entitled to specific performance. The purchase agreement provided that, in the event of the purchaser's default, vendor could either cancel and rescind the agreement and recover the property, or waive the default.²⁸ The court of appeals agreed with the trial court's conclusion that the two remedies enumerated in the purchase agreement were the exclusive remedies available to the vendor in the event of the purchaser's default. The decision pointed out that individual parties have a right "to make the terms of their agreements as they deem fit and proper, so long as those terms are lawful."²⁹

In *Lawyers Title Insurance Corp. v. Capp*,³⁰ a title insurance company (Lawyers) brought an action against the vendor (Capp) who paid for the policy. The action was to recover \$6,900 which the company paid the purchaser of the real estate pursuant to its liability under the policy. The vendor had conveyed land to the purchaser by a warranty deed which erroneously included a 1.38-acre strip that vendor had previously conveyed to another. Since the contract price was \$5,000 per acre, when purchaser paid vendor the purchase price, purchaser overpaid by \$6,900. In its original insurance commitment, the title insurer noted the fact that the strip had previously been conveyed by vendor. In a revised commitment, however, no mention was made of the prior conveyance.

The theory of the title insurer's action against the vendor was that the insurer, when it paid the purchaser, was subrogated to the purchaser's rights against the vendor. The trial court denied recovery, and the court of appeals affirmed, holding that the equitable doctrine of subrogation did not apply under the "unusual factual setting" of the case.³¹ The court carefully and emphatically

remand, the trial court found that the leaky faucet injured the vendor's security interest. The court denied recovery for damages for a broken water cooler and a broken front door, not because of any inherent distinction between faucets and water fountains, but because the evidence did not show that the purchaser caused or allowed the door and the water cooler to break.

²⁷370 N.E.2d 997 (Ind. Ct. App. 1977).

²⁸Vendor argued that the right to waive a default is meaningless unless it carries with it the ability to seek specific performance. The court stated that the vendor had the option of allowing the company to continue performance after a default, but vendor did not have the option of requiring purchaser to perform. *Id.* at 1000.

²⁹*Id.*

³⁰369 N.E.2d 672 (Ind. Ct. App. 1977).

³¹*Id.* at 674. The court noted that any right of subrogation that the insurer might have against the vendor must originate "from either the policy of insurance, or from the operation of the equitable doctrine of subrogation." *Id.* The policy of insurance was not in the record, so the court could look only to the equitable doctrine to support the insurer's claim.

limited its holding to apply only to the unusual facts presented. The court listed all the following facts as relevant and, apparently, as equally decisive:

- (1) The title insurance policy here involved is basically a tripartite agreement involving vendor, vendee and insurer.
- (2) Capp paid the consideration for the policy of title insurance.
- (3) Lawyers had actual knowledge of the overlap and had originally excepted that land from coverage under its commitment.
- (4) Capp paid and relied on Lawyers to search the record and provide an accurate legal description, which Lawyers failed to do.
- (5) Since Lawyers had excepted the overlap from its original commitment, failed to except it from the amended commitment, and offered no explanation, it is safe to assume that the error was Lawyers' mistake.
- (6) The policy of insurance and exceptions thereto were not made a part of the record.
- (7) Since a potential cause of action in tort existed in favor of [the vendee] and against Lawyers, the trial court may have interpreted Lawyers' payment of funds to be a settlement under the tort theory.³²

It would seem that vendors would be justified in relying only on the first, second, and fourth factors to preclude the insurer's equitable or contractual right of subrogation.

C. Real Estate Brokers

In two cases during the survey period, *Gerardot v. Emenhiser*,³³ and *Day v. West*,³⁴ the Indiana Court of Appeals discussed the statutory requirement that a contract for a broker's commission must be in writing. Indiana Code section 32-2-2-1, the so-called broker's Statute of Frauds, provides:

No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one (1) person of a purchaser for the real estate of another, shall be valid unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative: Provided, That

³²*Id.*

³³363 N.E.2d 1072 (Ind. Ct. App. 1977).

³⁴373 N.E.2d 935 (Ind. Ct. App. 1978).

any general reference to such real estate sufficient to identify the same shall be deemed to be a sufficient description thereof.³⁵

In *Day*, the written and signed listing agreement identified various buildings located on the property³⁶ and described the property as eighty acres "Located in Troy twp Dekalb Co Ind . . . 1 mile north McClellan Church on Bellefountain Rd. between Hamilton and Edgerton."³⁷ In deciding that this general description satisfied the statutory requirement, the court enunciated a new test for a sufficient description: "Whether from the information found within the four corners of the listing agreement a reasonable man could locate the correct property."³⁸ A 1922 case, *Hutchinson v. Borum*,³⁹ had interpreted the description proviso of the statute to require a written description sufficient to identify the property without resort to any parol evidence. In *Hutchinson*, a street address was determined to be inadequate.⁴⁰ The *Day* court noted that today in urban areas "the common and most reasonable means of locating property is by street address."⁴¹ The *Day* court overruled *Hutchinson* to the extent that *Hutchinson* was inconsistent with the reasonable man test enunciated in *Day*.⁴²

The *Day* court also ruled that the trial court had no probative evidence to justify the conclusion that the broker had failed to perform all the acts required to entitle him to a commission.⁴³ Under the arrangement in *Day*, as in most listing arrangements, the broker was entitled to a commission only if he procured a buyer ready, willing, and able to purchase the property on the listed or other satisfactory terms.⁴⁴ In *Day*, the broker procured an offer, the terms of which tracked the listed terms. Thus, the buyer was clearly ready

³⁵IND. CODE § 32-2-2-1 (1976). If the broker's right to a commission is not in writing, the broker cannot recover on a theory of quantum meruit. *E.g.*, *Voelkel v. Berry*, 139 Ind. App. 267, 218 N.E.2d 924 (1966).

³⁶The listing agreement referred to a three-bedroom house, a two-car garage, a pole barn, a basement barn, a brick school and a one-acre pond.

³⁷373 N.E.2d at 937.

³⁸*Id.* at 938.

³⁹78 Ind. App. 214, 135 N.E. 179 (1922).

⁴⁰*Id.* at 218, 135 N.E. at 180. The description was "549 East Drive Woodruff Place, Marion County, Indiana." *Id.* at 215, 135 N.E. at 179.

⁴¹373 N.E.2d at 938.

⁴²*Id.*

⁴³*Id.* at 940.

⁴⁴The broker was also entitled to a commission if the owner himself sold the property during the listing period. This created a so-called exclusive right-to-sell agreement. See Comment, *Colorado Real Estate Broker Listing Contracts*, 35 U. COLO. L. REV. 205, 211 (1963).

and willing to purchase on terms agreeable to sellers. Sellers, however, refused to sell.

The broker argued on appeal that he was not required to prove the buyer's financial ability to perform.⁴⁵ The court of appeals stated that, because the seller refused the buyer's offer outright: "[T]he question of [the buyer's] financial ability to purchase the farm never materialized."⁴⁶ If the court, by that statement, meant that the broker need not prove the buyer's financial ability to perform if the seller refuses to accept an offer which tracks the listed terms, the court's decision is contrary to the holding of *Kaiser v. Shannon*,⁴⁷ the case cited by the court in support of the above-quoted statement. A rule dispensing with the requirement for proof of financial ability would also not be a sound policy. An unscrupulous broker, knowing that his seller has had second thoughts about selling, could recover a commission upon proof that he produced a human being, physically and mentally capable of entering into a contract, with an acceptable offer in hand.⁴⁸

In *Gerardot* the court of appeals considered whether the broker's services were the "essential cause" of a sale for which he claimed a commission.⁴⁹ The court found sufficient evidence to support the trial court's finding that the broker "was not instrumental in bringing the sellers and buyer together and that the ultimate

⁴⁵It is universally agreed that "able" refers to financial ability. See the historical discussion in *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

⁴⁶373 N.E.2d at 939 (citing *Kaiser v. Shannon*, 120 Ind. App. 140, 90 N.E.2d 819 (1950)).

⁴⁷120 Ind. App. 140, 90 N.E.2d 819 (1950). In *Day*, the evidence of the buyer's financial ability to perform was apparently uncontradicted. The buyer's loan was "ready to be closed," and Day himself had offered to loan the buyer any money he needed to consummate the deal. 373 N.E.2d at 939. Thus, the *Day* court's holding could be interpreted as a determination that all the evidence of probative value supported the conclusion that the buyer was financially able to perform. In *Kaiser*, the broker procured an offer, but the seller refused to accept it. The court held that the purchaser's financial ability would not be presumed. 120 Ind. App. at 144, 90 N.E.2d at 820. The court noted that a presumption of financial ability arises when seller and buyer enter into a contract to buy and sell the real estate. *Id.* at 144, 90 N.E.2d at 820-21. See *Stauffer v. Linenthal*, 29 Ind. App. 305, 64 N.E. 643 (1902); *McFarland v. Lillard*, 2 Ind. App. 160, 28 N.E. 229 (1891). For a discussion of the injustice of raising a presumption of financial ability when seller accepts an offer made by broker's buyer, see *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

⁴⁸This may well have been what was attempted in *Kaiser*.

⁴⁹363 N.E.2d at 1077. The broker must prove that through his procurement "a third party had entered into a valid executory contract with vendors for the purchase of" the listed property. *Id.* The question of whether the broker was the procuring cause of a sale typically arises, as here, when the broker with a listing on the seller's property dealt with a potential buyer to whom, after the listing expired, the seller sold the property. For an excellent discussion of procuring cause, see *Cramer v. Guercio*, 331 So. 2d 550 (La. Ct. of App. 1976).

transfer was substantially altered in form, substance, and as to the parties involved."⁵⁰ The broker had tried to arrange an agreement between the seller and Martin Maciejko, but was unable to do so.⁵¹ Maciejko, in fact, became the ultimate purchaser of seller's property, but only by means of a complicated transfer whereby Maciejko exchanged his own farm for the seller's property and another property. This exchange was effected through the efforts of a third party. The court held that the evidence supported the conclusion that the broker was not the procuring cause of the multi-party transaction involving several parcels of real estate.⁵²

The court's conclusion on the procuring cause issue should have been sufficient to support an affirmance of the trial court's judgment denying the broker a commission.⁵³ The court, however, also discussed whether there was an agreement satisfying the Statute of Frauds requirement that the contract for a broker's commission be "in writing, signed by the owner of [the] real estate."⁵⁴ The broker had procured and forwarded to seller an offer to purchase seller's property. When the broker relayed the offer, he did not have a listing on the property. The seller proposed a counter-offer in writing, which he signed, and in which appeared the following:

If the above or approximate deal should go through, I would be willing to pay you [broker] 6% on the first \$50,000.00, 5% on the balance of the \$175,000.00. I would not expect to pay you any commission on the sale of any of the personal property.

....

I will expect an answer from you on all that I have written by Apr. 4, '72. In event I do not hear by that time, I will count it as a negative reply.⁵⁵

⁵⁰363 N.E.2d at 1073.

⁵¹The broker had a listing on the seller's property, but the listing had expired when the ultimate sale to Maciejko occurred. The broker had "tried to conclude an agreement between Martin Maciejko and Dr. Emenhiser but was unable to do so because Maciejko apparently had objection to the size, topography and improvements of the Emenhisers' farm." *Id.* at 1074.

⁵²*Id.* at 1077-78.

⁵³If the broker had had an exclusive agency or an exclusive right-to-sell listing at the time the seller entered into the exchange agreement with Maciejko, then the broker would have been entitled to a commission regardless of the outcome on the procuring cause question. See generally Comment, *supra* note 44, at 211. The terms of the seller's letter offering to pay the broker a commission, printed in the text accompanying note 55 *infra*, seem insufficient to create an exclusive agency or an exclusive right to sell. Thus, affirmance on the procuring cause issue would have been sufficient for affirmance of the trial court's judgment.

⁵⁴IND. CODE § 32-2-2-1 (1976). The entire statute is printed in the text accompanying note 35 *supra*.

⁵⁵363 N.E.2d at 1074.

The broker did not reply in writing by April 4, but he did bring another offer to the seller before that date. Nothing ever materialized between the seller and either of these two buyers.

Despite the fact that the "owner of such real estate"⁵⁶ signed a document which appeared to be an agreement to pay the broker a commission if "the above or approximate deal should go through,"⁵⁷ the *Gerardot* court held that because the broker did not sign anything, there was no writing sufficient to satisfy the statutory requirement.⁵⁸ The reasoning of the court is strained and faulty. The statute expressly requires only the signature of the owner of the real estate. The court seems to have reasoned that, by the terms of the seller's offer, there could be no "agreement" to pay a commission until the broker accepted the offer by a timely response⁵⁹ and, consequently, that there was no written "contract" without the broker's signature.⁶⁰ In fact, the court is doing exactly what it said the broker was doing when he argued that he did *not* have to reply in writing to the seller's offer to pay a commission—equating "inappropriately the need for a contract acceptance with the need for a broker's signature."⁶¹ The broker's acceptance of the seller's offer to pay a commission could be proved by parol evidence without contravening the Statute of Frauds writing requirement.⁶² The Statute of Frauds precludes proof of a different non-written offer to pay a

⁵⁶IND. CODE § 32-2-2-1 (1976).

⁵⁷363 N.E.2d at 1074. This is language of the seller's offer to pay a commission.

⁵⁸*Id.* at 1075.

⁵⁹The court referred to the seller's offer as "bilateral in nature." *Id.* at 1076. Presumably the court did not mean to suggest that the seller's offer promising to pay a commission looked to acceptance by a promise on the broker's behalf to procure a buyer. Perhaps the court meant that the seller's offer to pay a commission would be accepted not merely by the broker's performance of the requested act of procuring "the above or approximate deal" (a truly "unilateral" arrangement), but also by the broker's timely notification of his intent to attempt to arrange a satisfactory deal. This is pure speculation. The court's characterization of the seller's offer to pay a commission as "bilateral in nature" is not explained in the opinion. In any event, the court distinguished between the ambiguous "bilateral" arrangement in the present case and what the court refers to as "a unilateral contract form offered by a broker requiring [only] the signature of a seller." *Id.*

⁶⁰Perhaps the court is suggesting that the statutory requirement that the "contract" be in writing supersedes the express statutory provision that the owner is the one, impliedly the only one, who must sign. In other words, the court is saying that the "contract" is not in writing, as required by the statute, unless both the offer and the acceptance are in writing. This would be an unreasonable interpretation of legislative intent. The express requirement that the owner sign would have been unnecessary if the legislature intended that the term "contract" be read to require that both parties to the commission agreement sign.

⁶¹363 N.E.2d at 1076.

⁶²See cases cited in Annot., 30 A.L.R.2d 972 (1953).

commission, but the Statute of Frauds cannot be used, on the facts presented, to support a conclusion that there was no written agreement to pay a commission.⁶³ There was a written agreement, properly signed by the owner of the listed real estate; the only question that needed to be answered in *Gerardot* was whether the broker complied with the terms of the agreement.

D. Easements

In 1970, Center Company conveyed part of a parcel of real estate to Sedgwick House, a limited partnership of which Center Company was a general partner. In 1972, Center Company conveyed the remainder of the parcel to Brademas. The deed to Brademas contained a reservation, in favor of "Grantor, its successors and assigns," of an "easement for roadway, parking purposes and for the drainage of surface waters and waters discharged from the roof and floor drains of 'Sedgwick House' over, along and across" a described portion of the property conveyed to Brademas.⁶⁴ In *Brademas v. Hartwig*,⁶⁵ the court of appeals affirmed the trial court's judgment that, although Sedgwick House was not named as a grantee in the deed, the deed created an easement in its favor.

Relying on *Ogle v. Barker*,⁶⁶ Brademas argued that the reservation was ineffective to convey an interest to a stranger to the deed. In *Ogle*, the court had held that a grantor cannot, by reservation, convey a life estate to a party not named as a grantee in the deed.⁶⁷ The *Brademas* court distinguished *Ogle* as involving a life estate rather than an easement.⁶⁸ The court noted that, even under *Ogle*,

⁶³This statement is made on the assumption that there was an adequate description of the real estate in the signed writing. There is no discussion of the description in the recited facts of the case.

⁶⁴*Brademas v. Hartwig*, 369 N.E.2d 954, 956 (Ind. Ct. App. 1977).

⁶⁵369 N.E.2d 954 (Ind. Ct. App. 1977).

⁶⁶224 Ind. 489, 68 N.E.2d 550 (1946).

⁶⁷*Id.* at 495, 68 N.E.2d at 553.

⁶⁸369 N.E.2d at 957. The *Brademas* court gave no indication whether it would have followed the *Ogle* decision if a life estate had been reserved in the instant case. This author can think of no reason to treat a reservation of a life estate differently from a reservation of an easement. The *Ogle* decision was based upon the traditional, technical rule: "[T]here can be no valid and operative conveyance of land without words of grant or alienation." 224 Ind. at 494, 68 N.E.2d at 553. *Brademas* was willing to discard the technical rule in favor of a rule effectuating the "patently evident" intentions of the parties. 369 N.E.2d at 957. Whether an easement or a life estate is involved, it seems appropriate to reject technical rules of form and to attempt to discern and effectuate the parties' intentions from the substance of the transaction. It is interesting to note that the RESTATEMENT OF PROPERTY § 472, Comment b (1944), explicitly states that an easement may be created by reservation in favor of one not named as a grantee in the deed, but takes no position with respect to the creation of a life estate by such a reservation. See RESTATEMENT OF PROPERTY § 107, Comment g (1936).

the reserved interest was removed from the operation of the grant and was left in the grantor, who could, by a proper conveyance, convey it to anyone he chose.⁶⁹ The *Brademas* court, unable to think of a reason "why the grantor should be prevented from doing in one step that which he could do in two,"⁷⁰ adopted the policy propounded in the *Restatement of Property*: "[A]n easement may be created in C by a deed by A which purports to convey Blackacre to B in fee reserving an easement to C."⁷¹ This logical approach will serve to promote, rather than frustrate, the obvious intentions of the parties in most cases.

Brademas also contended that the deed could not create an interest in Sedgwick House because it did not describe the dominant estate. The court of appeals held that the dominant estate was adequately described.⁷² The deed, in fact, contained a legal description of property designated in the deed as "Sedgwick House."

In *Searcy v. LaGrotte*,⁷³ the court of appeals affirmed the trial court's denial of the existence of an easement over LaGrotte's property. The Searcys argued that an easement had been created by implication.⁷⁴ In 1925, a former owner divided a parcel of property between two of his children. The two children regarded a dirt road as the dividing line between the two parcels without concern as to the actual boundary. The dirt drive led from Franklin Road to a barn lot used by both children. In 1959, one parcel was conveyed to the Searcys, and, in 1960, the other was conveyed to LaGrotte. Subsequently, a survey was conducted which established that a part of the drive, including the access to Franklin Road, was located entirely on the Searcy parcel, another part of the drive and the barn lot were located entirely on the LaGrotte parcel, and the rest of the drive straddled both properties. A dispute arose over the Searcys' use of the parts of the drive on LaGrotte's land.⁷⁵ After a bench

⁶⁹369 N.E.2d at 957.

⁷⁰*Id.*

⁷¹RESTATEMENT OF PROPERTY § 472, Comment b (1944).

⁷²369 N.E.2d at 957. See *Ross v. Valentine*, 116 Ind. App. 354, 364, 63 N.E.2d 691, 695 (1946), in which the court stated: "The instrument by which an easement by express grant is created should describe with reasonable certainty the easement created and the dominant and servient tenements. . . . A reservation of an easement is not operative in favor of land not described in the conveyance." (citations omitted).

⁷³372 N.E.2d 755 (Ind. Ct. App. 1978).

⁷⁴The Searcys also argued that an easement had been acquired by prescription, that is, by adverse use for 20 years. See IND. CODE § 32-5-1-1 (1976). The court of appeals held that there was evidence to support the trial court's conclusion that the use was not adverse for the prescriptive period. 372 N.E.2d at 757. See also *Umbreit v. Chester B. Stem, Inc.*, 373 N.E.2d 1116 (Ind. Ct. App. 1978) (finding that appellants failed to meet burden of proving that easement had been acquired by prescription).

⁷⁵The facts are unclear. It seems that the Searcys were not asserting a right to use the barn lot.

trial, the Searcys were enjoined from using any part of the drive on LaGrotte's land.

The court of appeals stated the general rule that an easement will be implied by law "when the owner of an estate imposes an obvious and permanent servitude on one part in favor of another part, and at the time ownership is severed the servitude is in use and reasonably necessary for the fair enjoyment of the part benefited"⁷⁶ This statement reflects the traditional view regarding the implied grant of an easement.⁷⁷ When a use is apparent, permanent, and reasonably necessary to the enjoyment of the dominant estate at the time of a severance of title, an easement may be implied by law as part of the grant of the dominant estate, and as a burden on the servient estate, on the theory that the parties intended this result.⁷⁸ Once created, the implied easement may be extinguished only in the manners in which an express easement may be extinguished.⁷⁹ Cessation or diminution of the original reasonable necessity alone would not, by the traditional view, extinguish the implied easement.⁸⁰

⁷⁶372 N.E.2d at 757.

⁷⁷Most courts hold that reasonable necessity is sufficient for an implied grant of an easement, but strict necessity is required for an implied reservation because the implied reservation derogates from the terms of the grantor's otherwise absolute grant. See generally 2 G. THOMPSON, THE MODERN LAW OF REAL PROPERTY §§ 351-55 (repl. ed. J. Grimes 1961). Indiana seems to follow the view that reasonable necessity is sufficient in either case. See, e.g., Indiana Truck Farm Co. v. Chambers, 69 Ind. App. 292, 121 N.E. 662 (1919). In any event, in *Searcy*, because the severance occurred by apparently contemporaneous conveyances to two grantees, the policy reason supporting the imposition of the strict necessity requirement did not exist. All statements in this discussion regarding implied easements refer to easements implied because of prior use. See note 80 *infra* regarding implied ways of necessity.

⁷⁸See, e.g., Shandy v. Sell, 207 Ind. 215, 189 N.E. 627 (1934); John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N.E. 188 (1885). G. THOMPSON, *supra* note 77, § 351, at 309, states:

In determining whether an easement by implied grant has arisen, the cardinal consideration is the presumed intention of the parties as disclosed by the extent and character of the user, the nature of the property, and the relation of the separated parts to each other. Implied easements rest upon the intent of the parties not necessity alone.

(Footnotes omitted.)

The dominant estate is the estate benefited by the easement. The servient estate is the estate burdened by the easement. Before severance, because an owner cannot own an easement in his own land, the easement is frequently described as a "quasi-easement."

⁷⁹An easement may be extinguished by abandonment, release, adverse use, or merger of the dominant and servient estates. See generally G. THOMPSON, *supra* note 77, §§ 440-49.

⁸⁰The crucial determination in deciding whether an implied easement was created is whether a reasonable necessity existed at the time of severance of title. If the requirements for the creation of an implied easement then existed (apparent, permanent,

The troublesome feature of the *Searcy* decision is that several of the court's statements suggested that, to establish the existence of an implied easement, a reasonable necessity must exist not only at the time of severance of the unity of the title (in this case, when the former owner divided his land between his two children), but also throughout the existence of the easement. In other words, the court's language indicated that an implied easement will be extinguished when the reasonable necessity terminates. The court used the present tense in reference to whether use of the dirt road meets the reasonable necessity requirement. For example, the court stated: "Accordingly, the burden *is* on the party asserting the implied easement to prove that the servitude *is* reasonably necessary for the fair enjoyment of his land, not merely convenient or beneficial."⁸¹ Furthermore, the court stated: "The fact that the Searcys *have access* to a public road without passing over the LaGrotte parcel even more firmly establishes that use of the Disputed Area *is* merely convenient and beneficial, rather than reasonably necessary for the fair enjoyment of the Searcy property."⁸² The court's stated conclusion is unfortunately ambiguous as to the time when a reasonable necessity must exist: "There was sufficient evidence to find that the Disputed Area was neither permanent nor reasonably necessary for the fair enjoyment of the Searcy parcel, thereby negating the existence of an implied easement."⁸³ *Searcy* could be reconciled with the traditional views regarding the creation and

and reasonably necessary use), then the easement exists as if it had been expressly granted or reserved in the deed severing the unity of ownership. See *Romanchuk v. Plotkin*, 215 Minn. 156, 9 N.W.2d 421 (1943), where the court stated:

[T]he grant of the easement is implied only in the sense that the easement passes by the conveyance although not expressly mentioned . . . It is immaterial, from a legal point of view, whether the easement passes because the instrument expressly says that it shall pass, or because the circumstances are such as to call for a construction of the language used as so saying.

Id. at 165, 9 N.W.2d at 426 (*quoting* 3 H. TIFFANY, REAL PROPERTY § 780 (3d ed. 1939)).

A distinct type of implied easement is a way of necessity. A way of necessity will be implied, more because of a public policy against property without access than because of the parties' intent, if there was unity of title and a strict necessity at the time of severance, regardless of the existence of an apparent and permanent use at severance. A way of necessity lasts only so long as the necessity lasts. See generally G. THOMPSON, *supra* note 77, §§ 362-68. Several Indiana cases confuse easements implied from quasi-easements with ways of necessity. See, e.g., *Hunt v. Zimmerman*, 139 Ind. App. 242, 215 N.E.2d 867 (1966); *Krueger v. Beecham*, 116 Ind. App. 89, 61 N.E.2d 65 (1945). Perhaps the *Searcy* court was a victim of this confusion.

⁸¹372 N.E.2d at 758 (emphasis added).

⁸²*Id.*

⁸³*Id.* at 757. The court refers to the dominant parcel by using the name of the present owner. Arguably, this is only for convenience of identification.

duration of implied easements, if one concludes that the court chose its words carelessly in applying the stated rule to the facts. Perhaps the court could have found that the evidence supported the conclusion that use of the easement was merely convenient or beneficial, but not reasonably necessary, at the time of severance. The disputed portion of the road then was a dirt road, evident but not permanent, leading to a rear barn lot.⁸⁴ It is disconcerting, however, to see another ambiguous decision in an area of Indiana law that is already confused.

E. Zoning

In *Carpenter v. Whitley County Plan Commission*,⁸⁵ the court construed Indiana law to determine the number of votes required for official action of a plan commission. The statute provides: "A majority of members qualified by this chapter to vote, shall constitute a quorum. No action of the commission is official, however, unless authorized by a majority of the commission at a regular or properly called special meeting."⁸⁶ Several remonstrators challenged the Whitley County Plan Commission's approval of a plat for a proposed subdivision. The nine-member commission had voted five times on essentially the same plat, with the following results: (1) Four against approval, two in favor; (2) four in favor, two against; (3) four in favor, four against; (4) six in favor, two against; and (5) seven in favor, one against. The remonstrators argued that the first three votes were denials of the proposed plat and, thus, on the basis of *Braughton v. Metropolitan Board of Zoning Appeals*,⁸⁷ the Commission should not have reconsidered the determination "absent a change of conditions or circumstances."⁸⁸ A majority of the *Carpenter* court held that the *Braughton* rationale would not apply unless the prior actions were legally effective. The majority decided that the statute required, for official action by the Plan Commission, a vote one way or the other of five of the nine members—that is, a vote of a majority of the commission rather than a majority of those present and constituting a

⁸⁴The *Searcy* court inferentially noted that an apparent purpose to "service the barns rather than the homestead" supported the conclusion that use of the drive was merely convenient or beneficial, but not reasonably necessary. *Id.* at 758.

⁸⁵367 N.E.2d 1156 (Ind. Ct. App. 1977).

⁸⁶IND. CODE § 18-7-5-19 (1976).

⁸⁷146 Ind. App. 652, 257 N.E.2d 839 (1970).

⁸⁸*Id.* at 658, 257 N.E.2d at 842. The *Carpenter* court noted the rationale of *Braughton*: "[I]n the interest of economy, predictability, and repose of the parties, a matter which is finally determined should not be relitigated." 367 N.E.2d at 1158.

quorum.⁸⁹ The dissent argued that the majority misinterpreted the statute.⁹⁰

F. Eminent Domain

The Indiana Court of Appeals was very active in the eminent domain area during the survey period.⁹¹ In *City of Indianapolis v. Central Railroad*,⁹² the City of Indianapolis filed a complaint to condemn certain rail spurs owned by two railroads. Six months after the complaint was filed, the City moved to dismiss the condemnation action because of a change of plans. In granting the motion to dismiss, the trial court ordered the City to pay the railroads a total of \$12,365.25 to cover their attorneys' fees and expenses. The court of appeals reversed the award of attorneys' fees, following the general rule that each party involved in litigation must bear his own

⁸⁹367 N.E.2d at 1158-59, adopting the reasoning of the minority in *Ratner v. City of Richmond*, 136 Ind. App. 578, 591-93, 201 N.E.2d 49, 56-57 (1965) (Hunter, C.J., dissenting). In *Pruden v. Trabits*, 370 N.E.2d 959 (Ind. Ct. App. 1977), the Board of County Commissioners of Warrick County decided to approve a rezoning ordinance contrary to the recommendation of the Plan Commission. Plaintiffs argued that the Board's approval was not final because the ordinance had to be referred back to the Plan Commission for reconsideration. The court noted that, if an ordinance is amended or rejected, the Board is mandated by statute to return the ordinance to the Commission for reconsideration. Return of the rejected or amended ordinance is mandated by IND. CODE § 18-7-4-51 (1976). If, however, the ordinance is approved by the Board, even though it had been rejected by the Commission, nothing in the statute requires, and no purpose would be served by, further consideration by the Commission. The court noted that the Plan Commission "would have no authority to override or change the accepted version. Thus no purpose is served by requiring any further reconsideration [unless the ordinance is rejected by the Board or approved in an amended condition]." 370 N.E.2d at 966. If the Plan Commission's affirmative recommendation is not acted upon by the Board of County Commissioners within 90 days, it becomes effective. IND. CODE § 18-7-4-50 (Supp. 1978).

⁹⁰367 N.E.2d at 1162 (Staton, J., dissenting).

⁹¹In addition to the cases discussed in the text, see *Indianapolis Power & Light Co. v. Barnard*, 371 N.E.2d 408 (Ind. Ct. App. 1978) (reversing trial court's judgment that utility lacked the statutory authority to condemn the land); *State v. Zehner*, 369 N.E.2d 1103 (Ind. Ct. App. 1977) (construing IND. CODE § 32-11-1-6 (1976)) (holding condemnee's sale of fill dirt from residual land to contractors building a highway was not a special benefit and was not relevant as set-off against condemnation award); *Board of Aviation Comm'r's v. Schafer*, 366 N.E.2d 195 (Ind. Ct. App. 1977) (holding members of Clark County Board of Aviation Commissioners were de facto officers and were empowered to act to condemn property, despite alleged irregularities in certificates of appointment); *City of Hammond v. Drangmeister*, 364 N.E.2d 157 (Ind. Ct. App. 1977) (affirming judgment for damages in inverse condemnation action arising from taking by construction of a street on condemnee's property); *State v. Jones*, 363 N.E.2d 1018 (Ind. Ct. App. 1977) (approving income capitalization approach for establishing the fair market value of land when the income is derived from a sale of minerals or other soil materials).

⁹²369 N.E.2d 1109 (Ind. Ct. App. 1977).

counsel fees in the absence of specific statutory authority or a contractual agreement otherwise.⁹³ The court reviewed and rejected four grounds for the award of attorneys' fees. First, the court held that there was not sufficient evidence of "obdurate behavior," "oppressive conduct," or bad faith to justify the recognition of an exception to the general rule.⁹⁴ Second, the court held that Trial Rule 41(A)(2), which states that "an action shall not be dismissed at the plaintiff's instance save . . . upon such terms and conditions as the court deems proper,"⁹⁵ is "not elastic enough to embrace attorneys' fees on dismissal."⁹⁶ Third, the court held that the provision of the Eminent Domain Statute⁹⁷ that allows for "costs" to be paid by plaintiff does not encompass attorneys' fees as part of the term "costs."⁹⁸ Fourth, the court held that the Indiana Relocation Assistance Act⁹⁹ did not provide a basis for the award of fees because the condemnor was not an agency as defined in the Act.¹⁰⁰

In deciding that the award of attorneys' fees was not authorized, the court of appeals adhered to precedent established by the Indiana Supreme Court.¹⁰¹ Judge Sullivan expressed his dissatisfaction with this precedent:

I concur but do so in hope that the Supreme Court might reevaluate the course heretofore taken and under these circumstances, permit a trial court to award attorney fees under T.R. 41(A)(2) for condemnees who are put to unwarranted expense for the defense of actions improvidently brought by condemnors and which are voluntarily abandoned.¹⁰²

⁹³*Id.* at 1112.

⁹⁴*Id.* at 1113.

⁹⁵IND. R. TR. P. 41(A)(2).

⁹⁶369 N.E.2d at 1114.

⁹⁷IND. CODE § 32-11-1-10 (1976) provided: "The costs of the proceeding shall be paid by the plaintiff, except that in case of contest, the additional costs thereby caused shall be paid as the court shall adjudge." This section was amended by Act of May 3, 1977, Pub. L. No. 312, § 3, 1977 Ind. Acts 1434 (codified at IND. CODE § 32-11-1-10 (Supp. 1978)) to provide, in pertinent part:

However, if, in case of trial, the amount of damages awarded to the defendant by the judgment, exclusive of interest and costs, is greater than the amount specified in the last offer of settlement made by the plaintiff . . . , the court shall allow the defendant his litigation expenses in an amount not to exceed twenty-five hundred dollars (\$2,500).

⁹⁸369 N.E.2d at 1114.

⁹⁹IND. CODE §§ 8-13-18.5-1 to 20 (1976).

¹⁰⁰369 N.E.2d at 1114. "Agency" is defined in IND. CODE § 8-13-18.5-2(a) (1976).

¹⁰¹State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973) (Prentice, J., concurring) (Arterburn, J., dissenting with opinion) (Hunter, J., concurring in dissent).

¹⁰²369 N.E.2d at 1116 (Sullivan, J., concurring).

In *State v. Peterson*,¹⁰³ the court of appeals reversed a judgment of condemnation damages because the trial court refused to give the state's tendered instruction: "Loss of access is compensable and may be considered by you in determining the damages to be awarded the defendant[s] only when such loss of access is special and peculiar to this property, and only when no other reasonable means of access is available to the property."¹⁰⁴ Judge Garrard dissented on the ground that the tendered instruction was a misleading statement of the law.¹⁰⁵ He stated:

[T]he concept that there is no compensable injury unless "no other reasonable means of access is available," to be correct, must contemplate reasonableness in terms of the highest and best use of the property immediately prior to the take. . . . [W]here, as here, that relationship is not made clear, the instruction tends to mislead and confuse the jury into the belief that it should award no damages if there remains a reasonable means of securing ingress and egress for *any* purpose. Such a construction would deny the landowner damages to which he might be properly entitled.¹⁰⁶

In *Indiana & Michigan Electric Co. v. Stevenson*,¹⁰⁷ the court of appeals held that, when the utility cut a strip of corn on one property and cut several trees on another property in the course of surveying the properties prior to condemnation, the jury could reasonably have concluded that the utility so substantially interfered with the owners' rights as to amount to a taking.¹⁰⁸ The court also upheld jury awards of punitive damages.¹⁰⁹ Alternative methods of surveying were available which would have resulted in only slight damages to the corn and trees. The court stated: "The jury could have reasonably inferred that IMEC had knowledge of these alternative methods of surveying property, but elected not to use them because of the additional time and expense involved[; hence, IMEC's actions exhibited a heedless disregard for the property rights of landowners."¹¹⁰

¹⁰³364 N.E.2d 767 (Ind. Ct. App. 1977).

¹⁰⁴*Id.* at 768. The court held that a "party is entitled to have an instruction based upon his theory of the case submitted to the jury if within the issues and if there is evidence to support it." *Id.* Since the appellees did not argue that the refused instruction was covered by other instructions, the court assumed that it was not. In *State v. Beck*, 256 Ind. 318, 268 N.E.2d 874 (1965), the court found no reversible error when the trial court gave an identical instruction.

¹⁰⁵364 N.E.2d at 768 (Garrard, J., dissenting).

¹⁰⁶*Id.* at 769.

¹⁰⁷363 N.E.2d 1254 (Ind. Ct. App. 1977).

¹⁰⁸*Id.* at 1260.

¹⁰⁹*Id.* at 1261.

¹¹⁰*Id.* at 1260.

XV. Secured Transactions and Creditors' Rights

*R. Bruce Townsend**

During the year following the summer of 1977, the Indiana Court of Appeals earned stature in the field of secured transactions and creditors' rights. Its decisions reflect scholarship and hard work in this area of private law. Thankfully, all of these cases are not without controversy, and they, along with a group of bankruptcy and federal decisions involving the state of Indiana, provide some excellent material for this part of the Survey. Lawyers are invited to give special attention to recent decisions that have imposed a duty upon a disbursing mortgagee to procure releases;¹ allowed and denied damages to a forfeiting conditional seller, and in particular, the rule of waste established in the "leaky spigot" case;² denied subrogation to a title insurer against the vendor procuring insurance for his vendee;³ dealt with the "voidable" title of a bailee;⁴ recognized the debtor's efforts to subordinate a secured party in favor of an unperfected interest;⁵ allowed a secured party to recover a deficiency even though he had not notified a debtor of the sale;⁶ permitted an outright transferee of chattel paper to enforce it against the account debtor;⁷ applied the mechanic's lien statute in new situations;⁸ and recognized established principles of suretyship in some old and some new situations.⁹ Accolades for the finest effort

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¹Prudential Ins. Co. v. Executive Estates, 369 N.E.2d 1117 (Ind. Ct. App. 1977). See notes 24-27 *infra* and accompanying text.

²Reynolds v. Milford, 375 N.E.2d 265 (Ind. Ct. App. 1978); Finley v. Chain, 374 N.E.2d 67 (Ind. Ct. App. 1978). See notes 51-58 *infra* and accompanying text.

³Lawyers Title Ins. Co. v. Capp, 369 N.E.2d 672 (Ind. Ct. App. 1977). See notes 29-31 *infra* and accompanying text.

⁴McDonald's Chevrolet, Inc. v. Johnson, 376 N.E.2d 106 (Ind. Ct. App. 1978). See notes 65-70 *infra* and accompanying text.

⁵A-W-D, Inc. v. Salkeld, 372 N.E.2d 486 (Ind. Ct. App. 1978). See notes 78-81 *infra* and accompanying text.

⁶Hall v. Owen County State Bank, 370 N.E.2d 918 (Ind. Ct. App. 1977). See notes 83-100 *infra* and accompanying text.

⁷First Nat'l Bank v. Schrader, 375 N.E.2d 1124 (Ind. Ct. App. 1978). See notes 102-04 *infra* and accompanying text.

⁸At least five recent decisions involve mechanic's liens on real estate. See notes 105-28 *infra* and accompanying text.

⁹See notes 184-204 *infra* and accompanying text. Probably the most ingenious decision relating to suretyship is American States Ins. Co. v. Staub, Inc., 370 N.E.2d 989 (Ind. Ct. App. 1977), which held that a contractor's surety for the benefit of sub-

must go to *Hall v. Owen County State Bank*,¹⁰ which dealt with the liability of a debtor for a deficiency when he received no notice of the sale; however, many students of the law may have some reservations about the result. No praise should be given to four decisions, including *Savage v. Savage*,¹¹ which correctly indicated that pension rights, like wages, are not transferable or subject to usual creditor process. In denying pension rights the status of "marital property," the court showed a lack of sensitivity to the potentially horrid social and economic consequences of its decision. *Mid America Homes v. Horn*¹² placed too much emphasis upon record titles in allowing a subcontractor to obtain a lien without the notification to the known residential owner as required by statute. *First Savings & Loan Association v. Furnish*¹³ countenanced notoriously sloppy tax sale procedures. *Rauch v. Circle Theatre*¹⁴ allowed a dissolving corporation to distribute its assets to shareholders and ignore creditors with contingent claims.

A. Consumer Legislation

Consumer legislation had its ups and downs in the courts during the last year. On the down side, the Indiana Supreme Court denied transfer to *Holmes v. Rushville Production Credit Association*¹⁵ which allowed a seemingly flagrant violation of consumer credit disclosure requirements and refused attorney's fees to a debtor asserting liability, in a counterclaim, for concededly improper disclosures in a companion note. On the up side, a scholarly dissenting opinion¹⁶ by Justice Hunter in *Holmes* pointed out the majority's failure to note that the Uniform Consumer Credit Code¹⁷ (UCCC) and the Federal Truth in Lending Act¹⁸ contemplated "strict," as

contractors is not released to a subcontractor who has taken a note extending the time for payment.

¹⁰370 N.E.2d 918 (Ind. Ct. App. 1977). See notes 83-100 *infra* and accompanying text.

¹¹374 N.E.2d 536 (Ind. Ct. App. 1978). See notes 150-58 *infra* and accompanying text. For another discussion of this case, see Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 183-84 (1978).

¹²377 N.E.2d 657 (Ind. Ct. App. 1978). See notes 108-11 *infra* and accompanying text.

¹³367 N.E.2d 596 (Ind. Ct. App. 1977). See notes 36-41 *infra* and accompanying text.

¹⁴374 N.E.2d 546 (Ind. Ct. App. 1978). See notes 185-90 *infra* and accompanying text.

¹⁵353 N.E.2d 509, *remanded on rehearing*, 355 N.E.2d 417 (Ind. Ct. App. 1976), *transfer denied*, 371 N.E.2d 379 (Ind. 1978). For another discussion of this case, see Greenberg, *Contracts, Commercial Law and Consumer Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 81, 92-93 (1978).

¹⁶371 N.E.2d 379, 379 (Ind. 1978) (Hunter, J., dissenting).

¹⁷Adopted in Indiana at IND. CODE §§ 24-4.5-1-101 to 6-203 (1976).

¹⁸15 U.S.C. §§ 1601-1667 (1976).

distinguished from "substantial," compliance with disclosure requirements,¹⁹ and that attorney's fees to the debtor were mandated by his "successful action to enforce liability" even though established as a partial defense by counterclaim.²⁰ Another consumer credit decision in the United States District Court for the Northern District of Indiana determined that a debtor's claim for a truth-in-lending violation need not be asserted as a compulsory counterclaim in state proceedings on the original indebtedness and allowed a separate, later action in federal court.²¹ The Indiana Court of Appeals properly held that the UCCC provisions regulating insurance charges apply only to consumer credit, which was determined not to include loans made to enable a debtor to procure equipment for his trucking business.²² The court also held that credit granted by a subcontractor to a prime contractor for work performed on a residential owner's property and for which a mechanic's lien was claimed is not consumer credit within the meaning of the Federal Truth in Lending Act.²³

¹⁹Justice Hunter noted that the court of appeals found a disclosure which omitted the "total finance charge" (Regulation Z, 12 C.F.R. § 226.8(d)(3)) to be in "substantial compliance" with disclosure requirements based upon parol testimony of witnesses. 371 N.E.2d at 379. This writer was unable to find any decision allowing a required disclosure to be satisfied by parol proof, under either the Truth in Lending Act or the UCCC.

²⁰No reason was given for denying attorney's fees in the decision of the court of appeals. It could be explained by the fact that the debtor, while awarded damages on his counterclaim for one violation of disclosure requirements, was adjudged liable to the creditor for greater damages. In other words, the court may have been reluctant to award attorney's fees to the losing party. *See Rauch v. Circle Theatre*, 374 N.E.2d 546 (Ind. Ct. App. 1978); cf. *Bird v. Rector*, 154 Ind. 138, 56 N.E.129 (1900) (attorney's fees normally allowed mechanic under lien law would not be allowed where set-off exceeded claim for mechanic's lien).

²¹*Daugherty v. First Bank & Trust Co.*, 435 F. Supp. 218 (N.D. Ind. 1977). *Accord*, *Drew v. Flagship First Nat'l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977). Under the Federal Truth in Lending Act, a debtor may not set off his claim to the penalty in an action by the creditor on the principal debt until the claim is reduced to judgment. 15 U.S.C. § 1640(h) (1976) (effective Oct. 18, 1974). *But cf. Chapman v. Rhode Island Hosp. Trust Nat'l Bank*, 444 F. Supp. 439 (D.R.I. 1978) (set-off against bankruptcy claim of creditor allowed). If the debtor sues for a truth-in-lending penalty in federal court, it has been held that the creditor may not counterclaim unless he establishes separate grounds for federal jurisdiction. *Meadows v. Charlie Wood, Inc.*, 448 F. Supp. 717 (M.D. Ga. 1978) (based upon reasoning that claim of creditor is not a compulsory counterclaim under FED. R. CIV. P. 13); cf. *Newton v. Beneficial Fin. Co.*, 558 F.2d 731 (5th Cir. 1977) (debt discharged in bankruptcy could not be set off against claim of debtor for truth-in-lending violation arising out of the same debt). *But cf. Binnick v. Avco Fin. Servs. of Neb., Inc.*, 435 F. Supp. 359 (D. Neb. 1977) (debtor whose obligation to creditor was discharged brought suit for truth-in-lending violation—set-off by creditor allowed).

²²*Hall v. Owen County State Bank*, 370 N.E.2d 918, 933 (Ind. Ct. App. 1977).

²³*Mid America Homes, Inc. v. Horn*, 377 N.E.2d 657 (Ind. Ct. App. 1978) (constructing 15 U.S.C. §§ 1602(h), 1603(l), 1635 (1976)).

B. Real Estate Transactions

1. *Release of Liens; Duty of Disbursing Mortgagee to Obtain Releases of Junior Liens and Debts.*—A lender-mortgagee who undertakes disbursement of borrowed funds to prior lienholders and creditors is under a duty to obtain recordable releases of the liens and to obtain receipts showing that the debts have been paid. *Prudential Insurance Co. of America v. Executive Estates*²⁴ found such a duty grounded on an express agreement, the custom and practice in the local real estate community, and the relationship between the borrower-mortgagor and the mortgagee who insisted on making disbursements to prior lienholders and creditors.²⁵ In this case the mortgagee, who advanced funds for a housing development, failed to procure not only the release of a completion bond to the city but also the release of obligations and liens claimed by the contractor who later filed notice of a mechanic's lien and commenced litigation on the lien and an unpaid debt. Because of these omissions, a title cloud was placed on the development. As a result, lots could not be sold, expenses of litigation in defending against the claims of the contractor were incurred, the mortgage went into default, and the mortgagee brought suit to foreclose against the mortgagor who counterclaimed for damages resulting from the former's breach of duty. An award in excess of the mortgage debt plus a nearly equal amount of punitive damages to the mortgagor was reversed on appeal because the evidence neither showed oppressive or malicious misconduct justifying punitive damages²⁶ nor established the actual loss reflected in the judgment.²⁷ Although the final outcome of the

²⁴369 N.E.2d 1117 (Ind. Ct. App. 1977).

²⁵After finding an express agreement to procure releases and a duty arising from custom and practice, the court determined that the duty of the mortgagee also was based upon a principal-agent relationship. Cf. *Lake County Title Co. v. Root Enterprises*, 339 N.E.2d 103 (Ind. Ct. App. 1975) (duty of an escrow agent disbursing construction funds), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 325 (1976).

²⁶On appeal, the court found that the record did not establish "oppression or malice" by the mortgagee's failure to procure the proper releases. The court did not consider whether the action of the mortgagee was accompanied by "oppression or malice" in declaring default and foreclosing without allowance for the loss the action had caused. In other words, suppose *M* gives a mortgage to *E* on his house which *E* negligently destroys. Without giving *M* credit for the loss, *E* demands full payment and forecloses. The decision conveys the incredible inference that *E* is acting with motives which are benign and without "oppression or malice." But see *State Farm Mut. Auto Ins. Co. v. Shuman*, 370 N.E.2d 941 (Ind. Ct. App. 1977).

²⁷Evidence supporting a loss of net profits was held inadequate and too speculative where the proof showed the average price received by showing offers for four lots multiplied by the total number of lots, less the estimated promotional and sales expenses. Failure to show that all the lots were similar or that the price was

case will depend upon a new trial with respect to damages, the case serves as an excellent warning to lenders undertaking to disburse funds to the mortgagor's creditors and junior lienholders.

2. *Rights and Remedies of Lienholder and Debtor; Insurance.*—Often an insurer paying a loss is subrogated to the rights of the insured against a third party who is liable to the insured.²⁸ In *Lawyers Title Insurance Corp. v. Capp*,²⁹ insurers were advised that the rule does not permit subrogation against a party with whom they contract for the benefit of a third party. In this case, the vendor conveying land to a purchaser had procured title insurance for the purchaser from the insurer. When a title defect was paid off by the insurer, the insurer sought subrogation against the vendor on his covenants of title. The court denied subrogation as being inequitable.³⁰ The rule of the case is also important to such persons as lienholders and mortgagors who procure insurance for the protection of others to whom they might be liable.³¹

Another decision, *Augustine v. First Federal Savings & Loan Association*,³² recognized that a lienholder that procured insurance for the protection of a debtor might be under a duty to renew the policy or to notify the debtor of its expiration.³³ Summary judgment

typical made this proof so weak as to suggest only "gross profits." The court failed to indicate whether or not interest expenses on the mortgage and liabilities incurred in connection with charges which should have been released by the mortgagee were allowable.

²⁸E.g., *Hagerman v. Mutual Hosp. Ins., Inc.*, 371 N.E.2d 394 (Ind. Ct. App. 1978) (health and accident insurer subrogated to settlement obtained by insured against tortfeasor).

²⁹369 N.E.2d 672 (Ind. Ct. App. 1977).

³⁰*Id.* at 674.

³¹Cf. *Insurance Co. of N. America v. Martin*, 151 Ind. 209, 51 N.E. 361 (1898) (insurer paying loss to mortgagee subrogated to rights of mortgagee against mortgagor who breached terms of policy).

³²373 N.E.2d 181 (Ind. Ct. App. 1978). In this case the insurance covered the vendor's mortgagee, the vendor, and the buyer who later purchased the property on a conditional sales contract. The property was destroyed by fire a few days after the policy expired. Conflicting claims of all the parties including an insurance agent were raised on a motion for summary judgment which, according to the appellate court, had been improvidently granted because sealed depositions had not been considered by the court below.

³³373 N.E.2d at 183 n.1. The duty of the lienholder promising to procure insurance for the debtor is clear. *Sims Motor Transp. Lines, Inc. v. Davis*, 126 Ind. App. 344, 130 N.E.2d 82 (1956) (life insurance). It is less certain whether the lienholder procuring insurance or holding possession of the policy is under a duty to renew it or to notify the debtor before its termination. Cf. U.C.C. § 9-207(1) (secured party in possession under duty to use reasonable care in the custody and preservation of collateral). UCCC § 4.304 (notice of cancellation required to be given by creditor requesting termination of property or liability insurance). Case law in other jurisdictions is divided on the question. See *Chrysler Credit Corp. v. Friendly Ford, Inc.*, 535 S.W.2d 110, 19 UCC Rep. 849 (Mo. Ct. App. 1976), and cases cited therein.

against the debtor was reversed, leaving the scope of this duty for future resolution.

3. *Foreclosure of Liens; Right of Mortgagee to Notice of Tax Sale.*—In most mortgage and lien foreclosures, junior lienholders of record, who have possession or who are known by the foreclosing lienholders, must be made parties or the purchaser at the sale will acquire only the interest of those parties named, leaving the junior interest intact with a right to foreclose.³⁴ Early Indiana law did not apply this rule to tax foreclosures,³⁵ presumably either because the "King" should be given one of his prerogatives in such cases or because notice to the owner-mortgagor served as a fictional form of constructive notice to other lienholders. The Indiana Court of Appeals chose to follow precedent in *First Savings & Loan Association v. Furnish*,³⁶ and held that a tax foreclosure sale upon notice to the mortgagor—"owner" bound a mortgagee who was given notice of the sale only through a general notice published in a newspaper.³⁷ The decision thus attempts to resolve the unsettled question of whether the United States Supreme Court decision in *Mullane v. Hanover Bank & Trust Co.*³⁸ applies to tax lien sales. Under that decision, constructive notice by publication is inadequate when actual notice can be given to a party in judicial-type proceedings affecting his property.³⁹ Unfortunately, the court of appeals failed to consider the obvious fact that tax sales are generally known to be conducted in a careless, haphazard manner which do not produce a fair price for the property.⁴⁰ Lack of notice to interested parties more than likely is one of the reasons for low prices at tax sales. Hopefully, this decision will not end the search for due process of law.⁴¹

4. *Remedies of Conditional Sellers of Real Estate; Forfeiture: The Leaky Spigot Case.*—*Skendzel v. Marshall*⁴² has become a

³⁴E.g., *Catterlin v. Armstrong*, 101 Ind. 258 (1885).

³⁵*Baldwin v. Moroney*, 173 Ind. 574, 91 N.E. 3 (1910).

³⁶367 N.E.2d 596 (Ind. Ct. App. 1977). In this case the mortgagee received actual notice of the sale in time to redeem from the purchaser, but at the added expense of redemption. The court nevertheless decided that it retained standing to challenge the constitutionality of the procedure.

³⁷*Id.* at 600-01. The Indiana tax sale statute provides for 21 days' notice to "owners" by certified mail. IND. CODE § 6-1.1-24-4 (1976).

³⁸339 U.S. 306 (1950).

³⁹*Id.* at 320.

⁴⁰The court did take judicial notice of the fact that mortgagees are generally astute in keeping abreast of tax payments and records, thus justifying a rule that omits notice of tax sales to them. 367 N.E.2d at 601.

⁴¹Lack of notice of a tax assessment to an owner may constitute a denial of due process. *F.W. Woolworth Co. v. State Bd. of Tax Comm'r's*, 369 N.E.2d 958 (Ind. Ct. App. 1977).

⁴²261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974).

household name to Indiana lawyers. It held that typical conditional sales contracts of real estate, which grant the vendor a right to declare a forfeiture upon default of payments or other breaches of contract by the purchaser, are penal in nature if the buyer has paid a substantial amount on the contract.⁴³ The vendor in such a case must foreclose his interest as a mortgagee, thus giving the mortgagor a right to remain in possession and to redeem until the land is sold under judicial foreclosure procedures applicable to mortgages. Decisions of the Indiana Court of Appeals since *Skendzel*, however, have seized upon, and probably enlarged, certain equitable exceptions to the rule that such defaults are penal in nature and have allowed forfeiture if the vendee has not paid a substantial amount towards the purchase price, if he has committed waste or damage seriously affecting the value of the property, if he has abandoned possession, or if a combination of these factors is found to justify allowing the vendor to repossess and keep the payments made.⁴⁴ During the last year, the court of appeals upheld forfeiture in three cases where the vendee paid (1) \$32,000 of a purchase price of \$57,000;⁴⁵ (2) \$2,242 of a price of \$7,454;⁴⁶ and (3) \$1,000 and unstated payments on an obligation to pay \$9,815.⁴⁷ In addition, in the first case, the court found "abandonment" only because payments were not made.⁴⁸ In the second case, taxes were not paid.⁴⁹ In the third instance, the property was abandoned (vacated), waste of a trifling nature was committed, and casualty insurance had lapsed.⁵⁰

⁴³*Id.*

⁴⁴Donaldson v. Sellmer, 333 N.E.2d 862 (Ind. Ct. App. 1975); Goff v. Graham, 159 Ind. App. 324, 306 N.E.2d 758 (1974). Other decisions have followed *Skendzel* and denied forfeiture. Ogle v. Wright, 360 N.E.2d 240 (Ind. Ct. App. 1977); Bartlett v. Wise, 348 N.E.2d 652 (Ind. Ct. App. 1976); Tidd v. Stauffer, 308 N.E.2d 415 (Ind. Ct. App. 1974).

⁴⁵Morris v. Weigle, 375 N.E.2d 677 (Ind. Ct. App. 1978).

⁴⁶Reynolds v. Milford, 375 N.E.2d 265 (Ind. Ct. App. 1978).

⁴⁷Finley v. Chain, 374 N.E.2d 67 (Ind. Ct. App. 1978). Actually, the court assumed that \$6,893 had been paid on the price of \$22,815 for land priced under the contract.

⁴⁸375 N.E.2d 677. It appeared that the property was continuously occupied by a tenant of the purchaser, a Purdue professor. Evidence in this case also established that a vacant house without a bathroom deteriorated in value by \$6,000, but there was no proof of waste or that the value of the land had deteriorated below the amount of the obligation.

⁴⁹375 N.E.2d 265. In this case the vendor presented testimony of damage to the property, but the trial court over the vendor's steadfast objections refused to allow the purchaser to testify on this issue. The court of appeals held that the vendor could not support an award of damages for waste when the purchaser was not permitted to rebut the vendor's proof.

⁵⁰374 N.E.2d 67. In this case, as part of the same transaction, the vendor sold stock in the tavern to the purchaser under a separate obligation to pay and according to a distinct payment schedule along with an undertaking to pay some of the corporate debts. These payments were secured by the conditional sales contract, as was the

Of these three recent decisions allowing forfeiture, it is most interesting to note that in *Reynolds v. Milford*⁵¹ the lower court awarded the vendor possession, damages measured by the unpaid installments to the time the vendor regained possession, and overdue escrow payments for taxes and insurance. On appeal, the court held that the damage award was inequitable, and, in any event, would be limited to the reasonable rental value of the property for the wrongful occupation from the time forfeiture was declared to the time possession was recovered.⁵² On the other hand, in *Finley v. Chain*,⁵³ which should forever be known as the "leaky spigot case," the vendor of a tavern, who regained possession of the property after it was vacated, was allowed to recover overdue payments promised by the vendee in connection with the sale of stock in a corporation operating the tavern, such promise being secured by both the stock and the conditional sales contract.⁵⁴ The court also allowed damages for permissive waste described as resulting from "negligence or omission to do that which would prevent injury."⁵⁵ It then held that failure to repair several leaky water spigots was permissive waste, but that failure to fix a broken front door and a burned-out water cooler did not constitute such waste, apparently

obligation thereunder to pay a prior mortgage upon the land. Hence, the vendee's obligations were secured by a security interest in the stock and by the conditional sales contract with respect to the land. *See also Kruse, Kruse & Miklosko, Inc. v. Beedy*, 353 N.E.2d 514 (Ind. Ct. App. 1976). In *Beedy* the seller apparently had declared a forfeiture of the stock. Such a forfeiture, if declared, is permitted under U.C.C. § 9-501(4) which gives a secured party the same remedy with respect to both personal and real property as with realty only.

⁵¹375 N.E.2d 265 (Ind. Ct. App. 1978).

⁵²Where the vendor declares an forfeiture of a lease with an option to purchase, the purchaser is liable for rental payments accruing to the time of eviction. *Schlemmer v. Saine*, 106 Ind. App. 403, 20 N.E.2d 198 (1939); *Bernstein v. Rhoades*, 92 Ind. App. 553, 157 N.E. 463 (1927). Unlike the conditional sales contract, the payments due under a true lease with an option to purchase are considered to be rent. In the case of a conditional sale the payments usually are described in the contract as "rent" or "liquidated damages" upon forfeiture. Hence, the question always is not whether the payments are rent, but whether they are reasonable as liquidated damages. The court in *Reynolds* seems to have found that the unpaid payments along with the forfeited amount were unreasonable as liquidated damages.

⁵³374 N.E.2d 67 (Ind. Ct. App. 1978).

⁵⁴The purchaser under the conditional sales contract had promised to pay the bills of the corporation which included two liquor bills, a sewage bill, and a sales tax which were overdue and unpaid obligations at the time of forfeiture. As a type of third-party beneficiary contract, these obligations were secured by the conditional sales contract. The court held that the vendor was entitled to damages measured by these unpaid bills. Apparently, no claim was made for overdue and unpaid installments on the purchase price of the stock or on a mortgage assumed by the conditional buyer.

⁵⁵*Id.* at 79.

on the unarticulated basis that the evidence did not show that the conditional buyer made a practice of making these repairs but did repair the leaky faucets.⁵⁶ It was made clear, however, that, to be actionable, waste by a mortgagor or vendee must render the debt unsafe. In holding the conditional buyer liable for damages due to waste, the court indicated that it was adopting the same rule applicable to a mortgagor on the theory that the conditional sale was, in effect, a mortgage. This is a correct but surprising result considering that forfeiture had been declared and allowed.⁵⁷ The difficulty of measuring damages was resolved by limiting recovery to the reduced value of the property, not to exceed the difference between the unpaid obligation and the value of the land.⁵⁸ A new trial was ordered to enable the appellee-vendor to correct his deficiency in proof on the issue of damages.

⁵⁶*Id.* This may be the first Indiana case to attempt to define permissive waste. It seems that a tenant may make reasonable use of the property which is measured by the expected use to which it will be put. He is not responsible for ordinary wear and tear. *Jennings v. Bond*, 14 Ind. App. 282, 42 N.E. 957 (1895). Arguably, leaky faucets, the deterioration of the cooler, and a broken front door could be classified as ordinary wear and tear in the use of a tavern. *See also Restatement (Second) of Property* § 12.2, Comment d, Illustrations 1-3 (1977). However, the tenant is responsible for non-ordinary wear and tear caused by his customers. *Id.*, Comment g. While the rule of permissive waste imposes no duty upon a tenant to repair conditions resulting from ordinary wear and tear or forces for which he is not responsible, he may be under a duty to make sufficient repairs to avoid further permanent or consequential damages which foreseeably result from the condition. *Id.*, Comment d, Illustration 5 (1977). *See also Ferguson v. Stafford*, 33 Ind. 162 (1870). In *Finley*, if the door had been kicked in or damaged in an abnormal way while in the conditional purchaser's possession, it seems that the burden of going forward with evidence showing that the damage was caused by a stranger should have been placed upon the purchaser. *Cf. Bottema v. Producers Livestock Ass'n*, 369 N.E.2d 1189 (Ind. Ct. App. 1977) (rule applicable to bailment situation). *But see Merritt v. Richey*, 127 Ind. 400, 27 N.E. 131 (1891).

⁵⁷*Accord, Jowdy v. Guerin*, 10 Ariz. App. 205, 457 P.2d 745 (1969) (supporting proposition that conditional buyers and mortgagors are liable in damages for permissive waste; here, vacant house allowed to become "demolished").

⁵⁸*Accord, id.* It seems that damages to a structure are estimated by the usual rules allowing cost of repair. *Ingmire v. Butts*, 334 N.E.2d 701 (Ind. Ct. App. 1975). If they are permanent, damages may be measured by the reduced value of the land. *Knisely v. Hire*, 2 Ind. App. 86, 28 N.E. 195 (1891). Equity will enjoin waste by a mortgagor or conditional buyer only when proof is offered that the debt secured is impaired. In other words, the lienholder must show that the land is inadequate to satisfy the obligation and that the mortgagor or purchaser either is insolvent or is not responsible on the debt. *Cf. State ex rel. McCaslin v. Evans*, 44 Ind. 151 (1873) (insolvent vendee enjoined from cutting timber); *Gray v. Baldwin*, 8 Blackf. 164 (Ind. 1846) (enjoined mortgagor who was cutting timber and without other property); *Gleason v. Gleason*, 43 Ind. App. 426, 87 N.E. 869 (1909) (injunction denied against life tenant committing permissive waste).

C. Security Interests in Personal Property

1. *Creation of Security Interest; Parol Evidence to Show That Title Taken in Name of Secured Party Held as Security.*—Parol evidence is admissible to show that an outright conveyance of land to another person from or for a debtor was intended as a mortgage.⁵⁹ Does this rule apply to personal property, and is parol evidence prohibited by article 9 of the Uniform Commercial Code? In *Johnson v. Johnson*,⁶⁰ titles to a mobile home and automobile were taken in the name of two parents who financed the transaction for a husband and wife. It was held that, upon divorce, the court should have disposed of the property as marital property belonging to the husband and wife on the unarticulated assumption that parol evidence had established their ownership rights.⁶¹ This matter is not directly covered by article 9, but the result is in accord with the spirit of section 1-103 of the Code which adopts supplementary rules of equity⁶² permitting parol evidence to show that an outright conveyance is held as security.

2. *Lease of Goods (Bailment) as a Security Interest; Voidable Title.*—As a general rule, a lessor or bailor of goods is protected from the dishonesty of his bailee who, without authority, sells to a third party. He may recover in trover or replevin from the third person who takes his title subject to the doctrine of caveat emptor.⁶³ The lessor is not a secured party who must perfect by filing or by other means as provided in article 9 of the Uniform Commercial Code.⁶⁴ The bailee usually does not hold a "voidable" title empowering him to convey title to a bona fide purchaser. These principles were recognized in *McDonald's Chevrolet, Inc. v. Johnson*⁶⁵ where, after misrepresenting both his name and, obviously, his intent to return a house trailer at the expiration of a thirteen-day leasehold term, the lessee ultimately caused the vehicle to be sold to an In-

⁵⁹See also *Moore v. Linville*, 352 N.E.2d 846 (Ind. Ct. App. 1976), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 253, 258-59 (1977).

⁶⁰367 N.E.2d 1147 (Ind. Ct. App. 1977).

⁶¹*Id.* at 1149.

⁶²Prior to the Code, it was clear that title to personal property transferred to or taken in the name of a creditor could be proved to be held as security, so that the debtor could regain full rights upon repaying the loan. *Maple v. Seaboard Sur. Co.*, 117 Ind. App. 627, 73 N.E.2d 80 (1947). A creditor without possession claiming a security interest based upon an unwritten outright transfer from the debtor may have difficulty establishing his title under article 9 which requires a writing signed by the debtor describing the collateral and containing words of grant. *White v. Household Fin. Corp.*, 158 Ind. App. 394, 407-08, 302 N.E.2d 828, 836-37 (1973).

⁶³*Schinler v. Westover*, 99 Ind. 395 (1884); *Ingersoll v. Emmerson*, 1 Ind. 76 (1848).

⁶⁴*DeVita Fruit Co. v. FCA Leasing Corp.*, 473 F.2d 585 (6th Cir. 1973).

⁶⁵376 N.E.2d 106 (Ind. Ct. App. 1978).

diana good faith purchaser by means of several spurious certificates of title.⁶⁶ Ordinarily, when possession of goods is obtained by the fraud of an outright buyer, the seller has an equitable right to rescind.⁶⁷ The buyer, however, has a "voidable" title with a power to transfer title to a bona fide purchaser on the ancient theory that the equitable title of the seller may be cut off by a bona fide purchaser.⁶⁸ *Johnson* properly stands for the proposition that it is not the procurement of possession by fraud which creates the power in the fraudulent transferee. It is the giving of possession with intent to transfer a specific rescindable title induced by the fraud or wrongdoing which places the risk of loss upon the seller when the buyer conveys that interest to a third party.⁶⁹ *Johnson*, thus, reflects the rule that a transferee obtaining a partial title by fraud obtains only a voidable partial title. Hence, when the lessee obtained a thirteen-day lease by fraud, he had no more than the power to convey his thirteen-day leasehold interest to a bona fide purchaser.⁷⁰

It should be pointed out that a lessee or bailee without authority to dispose of the goods may hold a "voidable" title or a power to convey a good title to a bona fide purchaser in circumstances which were not present in *Johnson*.⁷¹ A lessee or bailee may have a voidable title if he is a seller of goods who is allowed to remain in

⁶⁶In this case the trailer was taken by the lessee from Texas to Alabama where it was registered. A certificate of title was obtained by the lessee in Nebraska. Finally, after procuring an Indiana title, it was traded to an Indiana dealer. The titles were obtained by theft of a serial number stolen from another motor home in Texas. The case actually involved litigation between the Indiana dealer and his buyer who successfully brought suit for breach of warranty of title when the vehicle was seized by the Indiana State Police.

⁶⁷*E.g.*, Woods v. Shearer, 56 Ind. App. 650, 105 N.E. 917 (1914) (by replevin action seller recovered property traded to buyer on fraudulent misrepresentations with respect to stock exchanged in the transaction; seller excused from returning worthless stock as a condition to rescission).

⁶⁸U.C.C. § 2-403(1); Stoner v. Brown, 18 Ind. 464 (1862).

⁶⁹The court probably exaggerated in stating that a "bailment involves no transfer of ownership; the bailee acquires only a possessory interest." For many purposes he acquires ownership rights. *E.g.*, The Winkfield, [Eng.] [1904] P. 410. A lessee having exclusive use of a motor vehicle for more than 30 days is an "owner." IND. CODE § 9-1-2(o) (1976).

⁷⁰Arguably, since a sub-bailment ordinarily is impermissible, the bailee acquired no transferable, voidable interest. Compare *Aetna Cas. & Sur. Co. v. Higbee*, 80 Ohio App. 437, 76 N.E.2d 404 (1947) (sub-bailment by fur storage company held to be a conversion), with RESTATEMENT OF SECURITY § 23, Comment b (1941). If a seller is induced to transfer a one-half interest in goods by fraud, however, it seems that the buyer is empowered only to sell the one-half interest to a bona fide purchaser. His power is limited to the interest transferred. See U.C.C. § 2-403(1) (purchaser of limited interest acquires only the limited interest).

⁷¹376 N.E.2d 106 (Ind. Ct. App. 1978).

possession.⁷² If the lessor entrusts the bailee of a motor vehicle with a properly indorsed certificate of title (which was not the case in *Johnson*), a bona fide purchaser taking a clear title should be protected.⁷³ A lessor entrusting possession to a bailee merchant who deals in goods of that kind may be estopped from claiming his title against a buyer in the ordinary course of business.⁷⁴ In addition, a lease may become, in effect, a security transaction if the lease calls for payments which allow the lessee to become the owner upon completion of the payments or for an additional nominal consideration. The lessor must perfect under article 9 if he is to be protected against later secured parties, purchasers, and creditors.⁷⁵

3. Discharge and Release of Secured Claim; Parol Evidence to Prove that Collateral Accepted in Discharge of Debt and to Prove Subordination.—*Lamb v. Thieme*⁷⁶ held that a debtor may prove a parol agreement with the secured party in which the latter accepted part of the collateral in full satisfaction of the debt. A debtor, however, may object to oral proof of an alleged agreement in which he surrendered his right of redemption after default when the evidence is offered by a creditor with a security interest in the collateral.⁷⁷

*A-W-D, Inc. v. Salkeld*⁷⁸ recognized that a prior secured party may orally subordinate his security agreement to a second

⁷²IND. CODE § 32-2-1-7 (1976) (seller's possession presumed fraudulent against seller's creditors and purchasers in good faith), as modified by U.C.C. § 2-402(2). This, in effect, is a codification of the rule in Twyne's Case, 3 Co. Rep. 806, 76 Eng. Rep. 809 (1601). See also *Seavey v. Walker*, 108 Ind. 78, 9 N.E. 347 (1886).

⁷³See also *Fryer v. Downard*, 134 Ind. App. 226, 187 N.E.2d 105 (1963); *Dresher v. Roy Wilmeth Co.*, 118 Ind. App. 542, 82 N.E.2d 260 (1948). A bona fide purchaser is not protected by reliance upon a forged certificate of title or a spurious title obtained by forgery. *Central Fin. Co. v. Garber*, 121 Ind. App. 27, 97 N.E.2d 503 (1951); *Buckeye Union Cas. Co. v. Nichols*, 4 Ohio Misc. 131, 212 N.E.2d 685 (1965) (no title passed through certificate of title procured by use of stolen serial number). Hence, the court in *Johnson*, see note 61 *supra*, properly did not regard as significant the alleged bona fide purchaser's acquisition of a certificate of title based upon a forgery and a spurious serial number.

⁷⁴U.C.C. § 2-403(2).

⁷⁵Compare U.C.C. § 1-201(37) with *Nickell v. Lambrecht*, 29 Mich. App. 191, 185 N.W.2d 155 (1970) and *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

⁷⁶367 N.E.2d 602 (Ind. Ct. App. 1977) (agreement established by admission of the secured party to whom stock was transferred by the debtor).

⁷⁷U.C.C. § 9-506. It has been held, however, that the debtor's surety may orally consent to a release of collateral. *Indianapolis Morris Plan Corp. v. Karlen*, 28 N.Y.2d 30, 268 N.E.2d 632, 319 N.Y.S.2d 831 (1971). The Code permits the secured party to keep collateral in satisfaction of the obligation upon written notice to the debtor who does not object in writing. U.C.C. § 9-505(2).

⁷⁸372 N.E.2d 486 (Ind. Ct. App. 1978).

lienholder who changes position in reliance thereon. Subordination, however, was denied in an interesting situation in which the debtor had given an unperfected security interest in inventory to *SP1*. When seeking credit from *SP2* who sought security in the same collateral, the debtor informed *SP2* of *SP1*'s security interest and that his "first obligation" was to *SP1*. The debtor then executed a security agreement with *SP2* which covered the collateral after advising *SP2* that he would be put in "second place." However, *SP2* first perfected his security interest and claimed priority over *SP1* under the Code rule giving priority to the secured party who first perfects.⁷⁹ A lower court finding of subordination was reversed upon the ground that there was no subordination agreement as a matter of law, but simply that there was a mistake of law as to priorities.⁸⁰ A dissenting judge ingeniously found a subordination agreement in what was determined to be a third-party beneficiary contract between the debtor and *SP2* for the benefit of *SP1*.⁸¹ The case is a good candidate for transfer.

4. *Remedies of Secured Party; Right to Deficiency upon Improper Sale.*—Subject to a few specified exceptions, a secured party may recover a deficiency upon disposition of collateral when the debtor is sent reasonable notification of the time and place for the sale, and the sale is conducted in a commercially reasonable manner.⁸² *Hall v. Owen County State Bank*⁸³ dealt with the requirements for reasonable notification and for a commercially reasonable sale, as well as with the secured creditor's rights to a deficiency, when these standards have not been met. With respect to notification of the time and place for the sale, the court held that the debtor's right to notice cannot be waived by him before or after default;⁸⁴ that in the case of joint debtors, notice to one will not bind the other;⁸⁵ and that an unwritten notice of an offer to buy the col-

⁷⁹U.C.C. § 9-312(5).

⁸⁰372 N.E.2d at 488.

⁸¹*Id.* at 486, 489 (Garrard, J., dissenting).

⁸²U.C.C. § 9-504(1). Notification to the debtor is not required when the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Notice is not required to be given to junior secured parties in the case of consumer goods. *Id.*

⁸³370 N.E.2d 918 (Ind. Ct. App. 1977).

⁸⁴*Id.* at 924. The Code expressly provides that the rights of the debtor and the duties of the secured party with respect to sale or disposition cannot be waived or varied. U.C.C. § 9-501(3). *Contra*, Holmes v. Rushville Prod. Credit Ass'n, 353 N.E.2d 509, remanded on rehearing, 355 N.E.2d 417 (Ind. Ct. App. 1976) (surety waived defense where secured party consented to disposal of collateral without notice).

⁸⁵370 N.E.2d at 925-26. The case, in effect, held that a partner (although the partnership was not clearly established) was not bound individually upon a note secured by partnership property and was entitled to notification. *Accord*, Atlas Thrift Co. v.

lateral a few hours before the sale followed by the debtor's assent is insufficient.⁸⁶ The court held that a casual sale to an inquiring buyer after repossession was reasonable and embarked upon an in-depth lecture as to what constituted a commercially reasonable sale.⁸⁷ Price was fixed as the most important item for determining commercial reasonableness, although it was held to be no basis, standing alone, for challenging a sale which otherwise is proper.⁸⁸ Other factors, listed as important by the court, include the price received for the goods when resold by the buyer; whether the collateral is sold in a retail or wholesale market; the number of bids solicited or received; and the whole range of circumstances accompanying a sale.⁸⁹ In this case, independent evidence⁹⁰ showing that the value of the collateral was equal to the sale price justified a finding that the private sale was commercially reasonable despite the failure of the secured party to have an appraisal, the unfamiliarity of the persons conducting the sale with the subject of the sale, and the sale to the first bidder without solicitations or notice to other possible buyers. While the case furnishes few concrete rules defining when a sale is commercially reasonable or unreasonable, the decision makes clear to all repossessing creditors that a sale, well-advertised in advance, which draws the attention of a broad audience, which brings a good price, and which is conducted by a knowledgeable person, aided by a careful appraisal of the collateral, stands a good chance of meeting Code requirements. Something less may suffice, but the price received then becomes a key factor.

Most importantly, *Hall* determined that a sale without reasonable notice to a debtor, which is probably commercially unreasonable as well, will not bar a creditor from recovering a deficiency,⁹¹ subject to one qualification. The secured party may recover

Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972). See also Clayton v. Fletcher Sav. & Trust Co., 89 Ind. App. 451, 155 N.E. 539 (1927) (notice of rescission must be given to all joint partners). A corporate officer individually bound as debtor upon a corporate obligation secured by corporate property is entitled to notification. Hepworth v. Orlando Bank & Trust Co., 323 So. 2d 41 (Fla. Dist. Ct. App. 1975); Third Nat'l Bank & Trust Co. v. Stagnaro, 25 Mass. App. Dec. 58 (1962); DeLay First Nat'l Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N.W.2d 745 (1976); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Super. 328, 258 A.2d 162 (1969).

⁸⁶370 N.E.2d at 926.

⁸⁷*Id.* at 928-30.

⁸⁸"The fact that a better price could have been obtained by a sale at a different time or in a different method . . . is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." U.C.C. § 9-507(2).

⁸⁹370 N.E.2d at 929-30.

⁹⁰Testimony of the buyer at the sale was held sufficient to establish the collateral's value at the time of sale as being equal to the price he paid for it. *Id.* at 931.

⁹¹The court adopted what appears to be the majority rule on this point. A minority of decisions construing the Uniform Commercial Code (which does not expressly deal

only the difference between the reasonable market value of the collateral at the time of the sale and the amount of the obligation. It is presumed that the market value of the collateral equals the indebtedness, and the burden of proof is upon the secured party to show that the indebtedness was higher than the market value of the collateral. He cannot prove value by the price realized at the sale, by his own testimony, or by the testimony of his agents alone.⁹² In the case of an improper sale, the debtor may enjoin the sale, and recover damages if he can show that the value of the collateral improperly sold exceeded the obligation.⁹³ Several important questions flow from this new rule. In determining the value of collateral improperly sold, will the court consider retail value or wholesale value in fixing the market value of the goods? In the case of motor vehicles, a difference in these market values is generally recognized. It seems that the court here should bind the secured party to the retail market value of the goods when the sale is determined to be improper, at least in the case of non-inventory items. This is the rule generally followed in computing damages for injuries to goods held by an owner who is not a retailer, wholesaler, or manufacturer.⁹⁴ Although the court approved private sales which are otherwise properly conducted by a secured party in a wholesale market,⁹⁵ a valuation of non-inventory collateral fixed in that market should follow only from a sale which is preceded by proper notification and conducted in a commercially reasonable manner. The court in *Hall* denied punitive damages because the sale was determined to have

with the problem) denies a deficiency to a secured party who fails to give reasonable notification of the sale or who sells in a manner which is not commercially reasonable. In support of the minority position, the court cited decisions from six states. Other recent decisions indicate that the minority view is virulent. *E.g.*, *Nixdorf Computer, Inc. v. Jet Forwarding, Inc.*, 579 F.2d 1175 (9th Cir. 1978); *Herman Ford-Mercury, Inc. v. Betts*, 251 N.W.2d 492 (Iowa 1977); *Jackson State Bank v. Beck*, 577 P.2d 168 (Wyo. 1978).

⁹²A similar presumption may arise when a surety is released to the extent of the value of collateral held by the principal. Cf. *Mutual Benefit Life Ins. Co. v. Lindley*, 97 Ind. App. 575, 187 N.E. 680 (1933) (court presumed value of collateral to be equal to the amount of indebtedness when extension released surety who was secondarily liable thereon only to the extent of the collateral).

⁹³U.C.C. § 9-507(1). In the case of consumer goods, the debtor is entitled to a penalty measured by the finance charge plus 10% of the loan or the cash price of the goods. *E.g.*, *Western Nat'l Bank v. Harrison*, 577 P.2d 635 (Wyo. 1978).

⁹⁴*Cassel v. Newark Ins. Co.*, 274 Wis. 25, 79 N.W.2d 101 (1956); RESTATEMENT OF TORTS § 911, Comment d (1939). When inventory is damaged or lost, the measure of damages is based on the wholesale price. *Chicago Title & Trust Co. v. W.T. Grant Co.*, 2 Ill. App. 3d 483, 275 N.E.2d 670 (1971).

⁹⁵*Accord*, *Mount Vernon Dodge, Inc. v. Seattle-First Nat'l Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977) (emphasizing that bank was not licensed to sell motor vehicles as retail dealer under licensing statute).

been conducted by the banker-secured party in good faith and after approval by the debtor, and dismissed the claim of the debtor for attorney's fees.⁹⁶ This is a correct result since the bank did not charge the debtor for its expenses in the sale or for attorney's fees and claimed no more than the deficiency it was awarded. However, *Hall* seems to recognize that punitive damages will be allowed when an improper sale is accompanied by bad faith or followed by an excessive demand for a deficiency.⁹⁷ Conceivably, since good faith is a standard governing all provisions of the Code,⁹⁸ the possibility remains that no deficiency will be allowed when the errant secured party is guilty of bad faith.⁹⁹ In no event should he be allowed attorney's fees or expenses of a bad sale, a point apparently recognized by the secured party who made no such claim in *Hall*. In fact, no decisions were found where these charges were added to a deficiency claim after a non-complying sale.¹⁰⁰

5. *Remedies of Secured Party; Right of Transferee to Collect Chattel Paper.*—A transferee of chattel paper may collect from the account debtor when the assignor (debtor of the transferee) is in default or when it is otherwise agreed.¹⁰¹ *First National Bank v.*

⁹⁶Attorney's fees were claimed under the UCCC which was held to be inapplicable. See note 23 *supra*. *Accord*, *Liberty Nat'l Bank & Trust Co. v. Acme Tool Div., Rucker Co.*, 540 F.2d 1375 (10th Cir. 1976). Usually, attorney's fees are denied in the absence of a contract or other equitable grounds. *City of Indianapolis v. Central R.R.*, 369 N.E.2d 1109 (Ind. Ct. App. 1977). Whoever heard of a security agreement giving a debtor the right to attorney's fees from a secured party when the latter violates his duties towards the former? Attorney's fees should be considered as an element of punitive damages. See *Indianapolis Journal Newspaper Co. v. Pugh*, 6 Ind. App. 510, 528, 33 N.E. 991, 996 (1892) (attorney's fees allowed as an element of punitive damages).

⁹⁷370 N.E.2d at 927 n.10. *Accord*, *Davidson v. First Bank & Trust Co.*, 559 P.2d 1228, 1232-33 (Okla. 1976); cf. *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785, 790-91 (Ind. Ct. App. 1975) (secured party wrongfully repossessing mobile home).

⁹⁸U.C.C. § 1-203.

⁹⁹Because the error committed by the secured party in *Hall* was determined to have been made in good faith, the question remains whether a secured party flagrantly violating Code resale provisions should be allowed a deficiency. If good faith is a factor here, and possibly it should be, the conflicting authority in the various states may possibly be reconciled upon this basis. Cf. *Associates Financial Servs. Co. v. DiMarco*, 383 A.2d 296 (Del. Super. 1978) (deficiency given to secured party who "errs in good faith").

¹⁰⁰In *Cornett v. White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973), the court awarded the secured party the expenses of preparing the collateral for resale, but in that case the expenses were incurred after an improper sale to the secured party who resold the goods at a much higher price which the court determined to be the proper value in allowing a deficiency.

¹⁰¹The secured party (assignee) is authorized to collect from the account debtor or obligor on an instrument "[w]hen so agreed and in any event on default." U.C.C. § 9-502(1). This probably means the default of the assignor-debtor.

*Schrader*¹⁰² held, in effect, that an outright purchaser of chattel paper is authorized, by implied agreement, to collect from the account debtor and to bring suit as the real party in interest.¹⁰³ Although not decided by the court, such a transferee in possession of chattel paper seems not only to be able to collect from and to sue an account debtor in default, but also, in some circumstances, to be under a duty to do so when the assignor is secondarily liable.¹⁰⁴

D. Creditors' Rights

1. *Mechanic's Liens.*—A person furnishing work, labor, or materials to a construction project may claim a lien upon the property under the Indiana mechanic's lien statute,¹⁰⁵ subject to rules which have been carefully worked out by decisions and frequent amendments. In 1977 the period of time in which a subcontractor must give advance notice to the owner of residential property that he intends to assert a lien was extended from fourteen to sixty days after commencement of the work in the case of new construction, and from five to thirty days after commencement of the work when alteration or repair is involved.¹⁰⁶ Both the old and amended versions of this law make notice to the residential owner a condition precedent to the acquisition of a lien.¹⁰⁷ *Mid America Homes v. Horn*¹⁰⁸ held that timely notice by a materialman to the record

¹⁰²375 N.E.2d 1124 (Ind. Ct. App. 1978).

¹⁰³The court mistakenly determined that an outright assignment of chattel paper was controlled by article 2 of the Code or by common law principles. In fact, however, article 9 governs most of the rights of the parties when chattel paper is taken either as security or by outright transfer. See, e.g., U.C.C. § 9-102(b). The right of the assignee (secured party by definition) to collect from the account debtor (original obligor) is governed by § 9-502 of the Uniform Commercial Code. See note 93, *supra*. The case correctly held that an outright transferee of chattel paper by agreement is authorized to collect and is the real party in interest regarding suit against the account debtor. Compare the last sentence of § 9-502(2).

¹⁰⁴Cf. U.C.C. § 9-207(1) (secured party in possession under a duty to take necessary steps to preserve rights against prior parties). Whether an assignee in possession of chattel paper or a secured party in possession of an instrument is under a duty towards his debtor-surety to bring an action against the account debtor or obligor is not clearly settled. Compare *In re Johnson*, 552 F.2d 1072 (4th Cir. 1977) (bank in possession of notes required to file claim against account debtor's estate in bankruptcy), with *In re United East Coast Corp.*, 6 UCC SERV. 449 (E.D.N.Y. 1969) (pledgee of note under duty only to give pledgor opportunity to bring suit upon notes in default). For the Indiana pre-Code law, see H. PRATTER & R. TOWNSEND, INDIANA UNIFORM COMMERCIAL CODE WITH COMMENTS §§ 9-207(1), 9-502 (1963).

¹⁰⁵IND. CODE § 32-8-3-1(1) (Supp. 1978).

¹⁰⁶Act of Apr. 12, 1977, Pub. L. No. 310, § 1, 1977 Ind. Acts 1424 (codified at IND. CODE § 32-8-3-1 (Supp. 1978)).

¹⁰⁷IND. CODE § 32-8-3-1 (1976 & Supp. 1978).

¹⁰⁸377 N.E.2d 657 (Ind. Ct. App. 1978).

owner of the land was sufficient, although the prime contract was made by a purchaser who had contracted to purchase the land from the record owner and who apparently had taken possession of the land.¹⁰⁹ In any event, the materials were invoiced to the purchaser, and the materialman was informed of the deed to the purchaser one day before the time for giving notice had expired.¹¹⁰ Without imposing an obligation of good faith or a duty to inquire as to the possessory status of the property, the court held that the notice requirement in the case of residential property was satisfied when the record owner received notice. The decision is a bad one and leaves the residential "owner" who leases or who holds less than a record title at the mercy of careless or unscrupulous subcontractors who ignore the contract between the prime contractor and the person with whom the prime contractor is dealing.¹¹¹ The owner's ignorance of this technical law will cause him great dismay when he discovers that a subcontractor holds a lien even though the owner has paid the prime contractor.

As a general rule, while an owner's interest in land may be subjected to a mechanic's lien for work performed in privity with a prime contractor, the owner is not liable on the contract to the subcontractor.¹¹² Privity between the subcontractor and the owner is

¹⁰⁹*Id.* at 660. The case did not clarify whether the purchaser had taken possession, but he certainly had done so through the contractor who had caused delivery to be made to the premises. For discussion concerning the proposition that possession is sufficient to put third parties on notice, see, Townsend, *Secured Transactions and Creditors' Rights*, 1974 Survey of Recent Developments in Indiana Law, 8 IND. L. REV. 234, 235 & n.7 (1974); Townsend, *Secured Transactions and Creditors' Rights*, 1975 Survey of Recent Developments in Indiana Law, 9 IND. L. REV. 305, 306 & n.6 (1975); Townsend, *Secured Transactions and Creditors' Rights*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 252, 254-55, 255 n.15 (1977).

¹¹⁰In *William F. Steck Co. v. Springfield*, 151 Ind. App. 671, 281 N.E.2d 530 (1972), failure to give notice to an equitable mortgagee who was the record owner was fatal to the lien. The case did not decide that notice to a record owner was adequate, nor did it hold that the subcontractor could ignore the party whose contract with the prime contractor served as the basis for the subcontractor's lien. If the contract with the prime contractor had been made by the record owner in *Horn*, notification by the subcontractor to the record owner should have been sufficient to bind the purchaser as long as the subcontractor complied with the requirements of good faith and his duty to determine the possessory status of the property. See Townsend, *Secured Transactions and Creditors' Rights*, 1973 Survey of Recent Developments in Indiana Law, 7 IND. L. REV. 226, 240, n.79 (1973).

¹¹¹It is settled that the term "owner" as used by the mechanic's lien law is not limited to record owners. *Potter v. Cline*, 161 Ind. App. 349, 316 N.E.2d 422 (1974), discussed in Townsend, *Secured Transactions and Creditors' Rights*, 1975 Survey of Recent Developments in Indiana Law 9 IND. L. REV. 305, 330 (1975).

¹¹²*Glick v. Seufert Constr. & Supply Co.*, 342 N.E.2d 874 (Ind. Ct. App. 1976) (promise not inferred when owned said he would "try to help sub get his money"). Where the prime contractor is the agent of the owner, a subcontractor dealing with the

lacking. *Lawshe v. Glen Park Lumber Co.*¹¹³ held, however, that an owner promising to pay a subcontractor, who had performed but had not been paid by the prime contractor, was liable upon his promise when the subcontractor refrained from recording notice of his lien in reliance upon the promise. The court was not required to consider the possible defense that the owner's promise to answer for the debt of another was within the Statute of Frauds¹¹⁴ since it was neither pleaded nor litigated. The court indicated, however, that under principles of constructive fraud or estoppel, the owner would be barred from interposing the statute as a defense where the evidence clearly established that the subcontractor had refrained from filing notice of his lien due to the owner's assurances.¹¹⁵

When a contractor fails to complete his promised performance, he may be denied enforcement of his express contract with the owner, but Indiana law allows him recovery in general assumpsit or on the basis of unjust enrichment.¹¹⁶ In enforcing his right on the implied contract, *Johnson v. Taylor Building Corp.*¹¹⁷ granted the contractor a mechanic's lien on the property less a deduction for damages resulting from the breach.¹¹⁸ A contractor supplying materials and labor for an eighty unit housing project was allowed to claim a lien upon an unimproved lot in the project, in *Inter-City Contractors v. Consumer Building Industries*.¹¹⁹ In another case, the lien covered both attorney's fees and prejudgment interest from the time of an account stated.¹²⁰

former may recover from the owner-principal. *Urbanational Developers, Inc. v. Shamrock Eng'r, Inc.*, 372 N.E.2d 742 (Ind. Ct. App. 1978). See text accompanying note 122 *infra*.

¹¹³375 N.E.2d 275 (Ind. Ct. App. 1978).

¹¹⁴IND. CODE § 32-2-1-1 (1976).

¹¹⁵This result is consistent with prior case law which indicates that a promise to pay a third person's obligation upon which the promisee holds a lien on the promisor's land constitutes a promise to pay the promisor's own debt. Cf. *Parker v. Dillingham*, 129 Ind. 542, 29 N.E. 23 (1891) (promise made to sub who had no lien on property). An owner promising to pay a subcontractor for previous and future work has been denied the benefit of the Statute of Frauds on the basis that the main purpose of the promise is to benefit the owner. *Board of Comm'r's v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N.E. 612 (1891); *Davis Constr. Co. v. Petty*, 91 Ind. App. 147, 168 N.E. 769 (1929).

¹¹⁶*Western Wheeled Scraper Co. v. Scott Constr. Co.*, 217 Ind. 408, 27 N.E.2d 879 (1940); *Cato Enterprises, Inc. v. Fine*, 149 Ind. App. 163, 271 N.E.2d 146 (1971).

¹¹⁷371 N.E.2d 404 (Ind. Ct. App. 1978). In this case the contractor had completed construction without installing a septic system because a required permit could not be obtained.

¹¹⁸*Id.* at 407. An owner may claim the right to a no-lien contract even though he later breaches the contract. *Hammond Hotel & Improvement Co. v. Williams*, 95 Ind. App. 506, 176 N.E. 154 (1931).

¹¹⁹373 N.E.2d 903 (Ind. Ct. App. 1978).

¹²⁰The right of a mechanic to recover interest and attorney's fees was recognized in *Drost v. Professional Bldg. Serv. Corp.*, 375 N.E.2d 241 (Ind. Ct. App. 1978) (award

Indiana law permits the prime contractor and the owner to enter into a no-lien contract if it is written, acknowledged, describes the property, and is recorded within five days after execution.¹²¹ *Urbanational Developers, Inc. v. Shamrock Engineering, Inc.*¹²² held that a no-lien contract in a separate writing may be ineffective against subcontractors if parol evidence establishes that the writing was executed after the original contract and was not supported by new consideration.¹²³ In addition, the decision indicates that a no-lien contract between an owner and a prime contractor will not bar later liens claimed by subcontractors when proof establishes that the prime is a wholly-owned subsidiary and, thus, the owner's agent or alter-ego.¹²⁴ Thus, it seems that a no-lien contract will bar subs only when it is made with an independent prime contractor—not with one who is a mere agent of the owner. Hence, a no-lien contract with a construction manager would be ineffective.¹²⁵ In *Imperial House of Indiana, Inc. v. Eagle Savings Association*,¹²⁶ the original contract between the owner and the prime contractor was amended by a no-lien provision drafted approximately one year later and duly recorded within five days after execution of the amendment. Several subcontractors, who had commenced work long before the new no-lien pro-

of interest and attorney's fees upheld despite an effort to avoid judgment under Trial Rule 60).

¹²¹IND. CODE § 32-8-3-1 (Supp. 1978).

¹²²372 N.E.2d 742 (Ind. Ct. App. 1978).

¹²³The original contract between the prime contractor and the owner contained a no-lien provision which was construed under the federal housing law as binding only the prime contractor and not subcontractors. *VNB Mortgage Corp. v. Lone Star Indus., Inc.*, 215 Va. 366, 209 S.E.2d 909 (1974). The separate no-lien agreement between the prime contractor and the owner was recorded and met the statutory requirements. In holding that there was no presumption of consideration for the no-lien agreement, the court of appeals overlooked Indiana Trial Rule 9.1(C) which makes lack of consideration an affirmative defense.

¹²⁴372 N.E.2d at 752. The complex facts showed that the owner was a partnership, and the sole general partner thereof was the president of the prime contractor and its parent corporation. The prime contractor was a paper corporation which was a subsidiary of its parent corporation, both having the same officers. The partnership agreement provided that the prime contractor or its parent corporation would be its agent and all contracts by the agent would bind the partnership. The court held that the case was a proper one for piercing the corporate veil, and that a subcontractor who was not paid could hold all the parties on its contract made only with the prime. *Id.* The court remanded the case for retrial of the issue of the validity of the no-lien contract since the trial court had not heard the relevant evidence. The court did not openly decide that a no-lien contract between an owner and its prime contractor who, in fact, is the owner's agent will be unenforceable against subcontractors. It should have done so.

¹²⁵For a current decision dealing with the status of the contract manager, see *University Casework Sys., Inc. v. Bahre*, 362 N.E.2d 155 (Ind. Ct. App. 1977) (general contractor had standing to seek arbitration with a sub).

¹²⁶376 N.E.2d 537 (Ind. Ct. App. 1978).

vision and its recordation, continued to perform. Ultimately, they were not paid and they filed proper notice of mechanic's liens. Successors of the owner challenged the liens on the ground that the work for which the lien was claimed had been performed after the no-lien contract had been recorded. The court ruled that subcontractors, who commence performance under a contract without a no-lien provision being recorded within five days after its initial execution, are not charged with a subsequently recorded no-lien amendment to the original contract until they have actual knowledge of it.¹²⁷ In other words, subcontractors are not required to search the record each day before work or materials are furnished to determine whether or not a no-lien contract has been recorded. I hope the decision means that no subcontractor will be bound by a no-lien contract or subsequent no-lien amendment unless there is recordation within five days after the original contract is executed or unless the subcontractor receives actual knowledge of the no-lien provision before he supplies the work and materials for which his lien is claimed. This interpretation will enable the subcontractor to rely upon the original contract and lack of recordation within the five-day period following its execution, thus limiting his need to search the records for a later no-lien provision which should bind him only after he receives actual notice.¹²⁸

2. *Artisan and Possessory Liens.*—The Uniform Commercial Code provision granting a lien to warehousemen and allowing foreclosure by them under power of sale¹²⁹ was held by the United States Supreme Court to be immune from challenge in a civil rights action brought in federal court upon the obfuscatory ground that no "state action" was involved.¹³⁰ The Court apparently did not decide whether the statute was otherwise constitutional. Three justices

¹²⁷*Id.* at 542.

¹²⁸Suppose that the owner and prime contractor sign a no-lien contract, and it is not recorded until sixty days after execution. By the same token, suppose that the owner and the prime contractor sign a no-lien amendatory provision sixty days after execution of the original contract, and it is recorded within five days. In either case, suppose further that a subcontractor commences work more than five days after the original contract, either before or after recordation of the no-lien contract or provision. Should the subcontractor be protected? IND. CODE § 32-8-3-1 (Supp. 1978) provides that a no-lien provision or stipulation "in the contract" is effective against subcontractors performing prior to the time of recordation. It is suggested that the term "in the contract" refers to the original contract. As a result, unless the no-lien provision in the contract or one amending it is filed within five days of the original contract, the notoriety of the contract in the contracting community and the lack of recordation within five days is enough to protect all subcontractors as long as they do not have actual notice of the no-lien terms.

¹²⁹U.C.C. § 7-210.

¹³⁰Flagg Bros., Inc. v. Brooks, 98 S. Ct. 1729 (1978).

found that "state action" was present and that the statute in question, which delegated to a warehouseman state power to determine title in the form of a self-help remedy, constituted a denial of due process.¹³¹

3. *Federal Liens; Priority over Inchoate Liens.*—The doctrine that the King can rape his subjects at will has lost some of its literal effect, but it continues to shame the law in many areas. For example, if *E* obtains a lien first in time, a later property interest or lien claimed by the federal government will take priority if the prior lien is "inchoate." This is true even though *E*'s lien might prevail over subsequent similar claims recognized under state law.¹³² Priority is determined by federal law which has nurtured the doctrine in order to satisfy its fiscal appetite. Two recent federal decisions from Indiana have applied this rule to mechanic's lienholders involved in a construction project insured by the Department of Housing and Urban Development.¹³³ In each instance, the liens arose and were perfected under state law and, thus, would take priority under state law over the mortgagee from whom the federal government acquired title.¹³⁴ Since the liens were determined to be inchoate, apparently because no judgment had established the amount of the lien, however, they were deferred to the mortgage insured by, and subsequently assigned to, the government.¹³⁵ Another decision involving a tax lien failed to consider whether or not a prior, revocable assignment of future wages was so inchoate that an ensuing tax lien would take priority.¹³⁶ The assignment of wages, which were collected by the assignee through an escrow arrangement after the tax lien attached, was given priority. The time at which a lien becomes choate is uncertain, but is said to occur when the lien-

¹³¹*Id.* at 1745 (Stevens, White, Marshall, JJ., dissenting).

¹³²On this point, the Indiana Court of Appeals has boldly overruled the United States Supreme Court in holding that a judgment lien is choate. *Muniz v. United States*, 129 Ind. App. 433, 155 N.E.2d 140 (1958) (overruling *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396 (1817)).

¹³³*Willow Creek Lumber Co. v. Porter County Plumbing & Heating, Inc.*, 572 F.2d 588 (7th Cir. 1978) (applying the weight of precedent, but recognizing the rule that state law is "not without some merit"); *McCollough Constr. Co. v. Agricultural Prods. Corp.*, 437 F. Supp. 404 (N.D. Ind. 1977) (recognizing that the rule "may at times be inequitable and disruptive of the local commercial scheme"; the court followed what it determined to be the weight of federal decisions).

¹³⁴Under Indiana law, the mechanic's lien would take priority or at least rank in equal priority with a later construction mortgage. *McLaughlin Mill Supply Co. v. Laundry Serv. Inc.*, 95 Ind. App. 693, 184 N.E. 429 (1933); IND. CODE § 32-8-3-2 (1976).

¹³⁵572 F.2d at 590-91; 437 F. Supp. at 407.

¹³⁶*Wagner v. United States*, 573 F.2d 447 (7th Cir. 1978). The 1966 Tax Lien Act eliminated many problems of choateness and, in particular, deferred tax claims and liens to mechanic's liens. 26 U.S.C. § 6323(a) (1976).

holder, the property, and the amount of the lien are established.¹³⁷ Since the rule often conflicts with state law and commercial practice, it remains an archaic reminder that the King is entitled to his perquisites, no matter how unfair they may be.

4. *Execution; Proceedings Supplemental.*—The problem of compulsory process as a means for reaching a debtor's assets through execution and proceedings supplemental was tangentially touched upon by three cases heard by the United States Supreme Court. One permitted a search by firefighters without a warrant.¹³⁸ Another permitted the use of a search warrant in order to obtain evidence.¹³⁹ A third required a search warrant based upon something less than probable cause in order to investigate possible violations of the Occupational Safety and Health Act.¹⁴⁰ All, by analogy, infer that a sheriff armed with an ordinary writ of execution cannot break doors in his search for assets or evidence of property subject to creditor process, but he may do so when he is armed with a court order issued upon evidence of probable cause.¹⁴¹ Something less than such an order may justify an unauthorized search of a debtor's premises as indicated in the first and third cases, which afford little aid in marking the parameters of this unusual power.

*Protective Insurance Co. v. Steuber*¹⁴² recognized the purpose of Trial Rule 69(E), expediting proceedings supplemental, and permitted an appeal by a garnishee from a proceedings supplemental order without the need for filing a motion to correct errors.¹⁴³

5. *Enforcement of Equitable Decrees.*—A spouse who fails to abide by a decree awarding a property settlement in the form of a lump sum or in a specified amount payable in installments cannot be held in contempt.¹⁴⁴ This rule, which was recognized by the Indiana Supreme Court in order to avoid imprisonment for a debt, was

¹³⁷Thus, the lien obtained by an attaching creditor is inchoate. *United States v. Security Trust & Sav. Bank*, 340 U.S. 47 (1950). A lien which is unperfected as against purchasers and lien creditors probably is inchoate. *E.g., Sams v. Redevelopment Auth.*, 436 Pa. 524, 528, 261 A.2d 566, 570 (1970).

¹³⁸*Michigan v. Tyler*, 98 S. Ct. 1942 (1978).

¹³⁹*Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978) (search of a newspaper office).

¹⁴⁰*Marshall v. Barlow's, Inc.*, 98 S. Ct. 1816 (1978).

¹⁴¹A search is forbidden without a warrant. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 252, 277 (1977). A search warrant issued upon false testimony or evidence does not justify a search thereunder. See *Franks v. Delaware*, 98 S. Ct. 2674 (1978).

¹⁴²370 N.E.2d 406 (Ind. Ct. App. 1977). A judgment in a proceedings supplemental against a garnishee insurer was reversed when an appeal in the principal action established that a default was improperly entered without notice.

¹⁴³*Id.* at 411-12.

¹⁴⁴*State ex rel. Shaunki v. Endsley*, 362 N.E.2d 153 (Ind. 1977).

qualified by the court of appeals in *Marburger v. Marburger*¹⁴⁵ which indicated that contempt would lie against a husband who had been ordered to pay marital creditors.¹⁴⁶ After the husband failed to pay the debts for which the wife was also liable, she obtained a discharge in bankruptcy.¹⁴⁷ She then brought civil contempt proceedings against the errant husband, claiming as damages the fees paid to her attorney in the bankruptcy action. After the court noted that the husband could be held in contempt, it reasoned, nonetheless, that the wife could not enforce the decree because she had not proved damages.¹⁴⁸ The wife suffered no loss because the bankruptcy discharge had released her from the debts. The fees incurred in procuring the discharge were held to be improper as a measure of damages for civil contempt, although it was conceded that attorney's fees may be awarded to a party successfully prosecuting civil contempt proceedings.¹⁴⁹

6. *Assets Subject to Creditor Process; Pensions.*—A recent decision of the Indiana Court of Appeals held that a husband's pension is not considered marital property upon divorce.¹⁵⁰ Without taking into account the adverse social and economic consequences of the decision as it relates to the division of "marital property,"¹⁵¹ the case seems to presuppose, for traditional purposes of transferability and claims of creditors, that rights to be received under a pension plan are not a present vested property interest to be liquidated and appraised at present value.¹⁵² Therefore, creditors must treat the

¹⁴⁵372 N.E.2d 1250 (Ind. Ct. App. 1978).

¹⁴⁶The basis for this holding probably comes from a combination of precedents. In *State ex rel. Schutz v. Marion Sup. Ct.*, 261 Ind. 535, 307 N.E.2d 53 (1974), the dissent had difficulty in distinguishing between decrees directing the payment in money to the other spouse, which were not subject to contempt, and decrees directing payment to a third party which were subject to contempt. *Id.* at 535, 539, 307 N.E.2d at 53, 56 (Arterburn, C.J., dissenting). Another decision held that a divorce decree directing payment of creditors may not be enforced by creditors. *Selner v. Fromm*, 145 Ind. App. 378, 251 N.E.2d 127 (1969). In *Marburger* the creditors were not parties to the proceeding.

¹⁴⁷The husband had previously taken bankruptcy but had not scheduled the wife. As a result, the court held that his obligation to her was not discharged. See notes 165-67 *infra* and accompanying text.

¹⁴⁸372 N.E.2d at 1253.

¹⁴⁹*Id.* See *Chadwick v. Alleshouse*, 250 Ind. 348, 233 N.E.2d 162 (1968) (payment ordered to be made to attorney).

¹⁵⁰*Savage v. Savage*, 374 N.E.2d 536 (Ind. Ct. App. 1978).

¹⁵¹But see *Bodenhorn v. Bodenhorn*, 567 F.2d 629 (5th Cir. 1978) (holding that unvested army pension was community property to be taken into account in dividing marital estate).

¹⁵²The court analogized the income from a pension with income from wages for the purpose of excluding it from marital property and supported its opinion with *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977) (holding that the future income of a college professor could not be evaluated for purposes of dividing such property).

pension as income or as earnings which may not be assigned,¹⁵³ but which, in Indiana, may be garnished by proceedings supplemental.¹⁵⁴ While Indiana has no general exemption law with respect to pensions or income therefrom,¹⁵⁵ the Federal Truth in Lending Law provides an exemption out of earnings which includes periodic pension payments and which is either twenty-five percent of the weekly earnings or the amount of weekly earnings in excess of thirty times the minimum wage, whichever is smaller.¹⁵⁶ Orders for the "support of any person" are excluded from this exemption by the federal law,¹⁵⁷ but the exclusion would probably not apply to a decree dividing marital property since the Indiana law generally does not measure property division by a duty of support.¹⁵⁸

7. *Bulk Sales.*—A return of inventory to the original seller may be a bulk sale.¹⁵⁹ An analogous problem was presented, but not recognized, in the rather vague claims which were made in *Mooney-Mueller-Ward, Inc. v. Woods*.¹⁶⁰ Here, the lessee of a drugstore agreed to maintain the inventory and its contents. After the lessor had repossessed the store, as well as the drugs, and the tenant had taken bankruptcy, a creditor of the tenant, who had supplied some of the inventory, claimed a bulk sale. The court denied relief on the ground that the tenant was not the agent of the landlord who had leased the store and the inventory to a second tenant in the mean-

¹⁵³Wages may not generally be assigned. IND. CODE §§ 24-4.5-2-410, 24-4.5-2-403 (1976). *But see* Wagner v. United States, 573 F.2d 447, 451 (7th Cir. 1978) which overlooked the statutes cited above and applied IND. CODE § 22-2-6-2 (1976). *Wagner* properly held that an assignment of wages was revocable and that future wages were not subject to a federal tax lien.

¹⁵⁴IND. CODE § 31-1-44-7 (1976). *See* Mitchell v. Godsey, 222 Ind. 527, 53 N.E.2d 150 (1944) (lien upon income or profits not exceeding 10% allowed in proceedings supplemental).

¹⁵⁵The Indiana law exempts "wages, commissions, income, rents or profits." IND. CODE § 24-4.5-5-105 (1976). *In re Power*, 115 F.2d 73 (7th Cir. 1940) held that income from a fully paid annuity contract was not exempt under a statute then exempting only "income or profits." Some statutes exempt particular pensions of government employees. *E.g.*, IND. CODE §§ 10-1-2-9, 18-1-12-11, 19-1-18-21, 19-1-24-4 (1976).

¹⁵⁶15 U.S.C. § 1673 (1976). "Periodic payments pursuant to a pension or retirement program" are included within the definition of "earnings" to which the exemption applies. *Id.* § 1672(a).

¹⁵⁷*Id.* § 1673(b).

¹⁵⁸Maintenance may be granted to a spouse only in the case of mental or physical incapacity. *Wilcox v. Wilcox*, 365 N.E.2d 792 (Ind. Ct. App. 1977) (construing IND. CODE §§ 31-1-11.5-9(c), -11 (1976)).

¹⁵⁹The bulk sales statute is article 6 of the Uniform Commercial Code. Presumably, a return of inventory will qualify as a bulk sale under that law, although no decisions on that point were found.

¹⁶⁰371 N.E.2d 400 (Ind. Ct. App. 1978). *See generally* Annot., 59 A.L.R.2d 1115 (1958).

time.¹⁶¹ The decision did not consider whether the landlord would be accountable to the first tenant's creditors as a bulk purchaser as would the second tenant if he acquired the inventory with notice of the bulk sale.¹⁶² If the provision in the lease had been construed to be a contract to sell the replenished inventory in the tenant's possession, the transaction would have been presumptively fraudulent with respect to the seller's (tenant's) creditors under the Indiana fraudulent conveyance statute.¹⁶³ In any event, the right to avoid the conveyance of the inventory passed exclusively to the lessee's trustee in bankruptcy, so that the creditor's only remedy was to proceed in the bankruptcy court.¹⁶⁴

8. *Receiverships.*—A receiver may not be appointed without providing either notice or affidavits based upon belief.¹⁶⁵ Although not considered by a recent decision applying this rule, it should be noted that a proper order appointing a receiver without notice should be followed by a prompt hearing.¹⁶⁶ Another decision refused to appoint a receiver upon request of a creditor with a contingent claim against a liquidating corporation despite the fact that the corporate assets were being distributed to shareholders without making provision for the creditor.¹⁶⁷

9. *Bankruptcy; Dischargeability of Particular Claims.*—Dischargeability of particular claims under section 17 of the Bankruptcy Act has received considerable attention in the last year. As a general rule, governmental claims for taxes are not discharged.¹⁶⁸ This rule was applied by the United States Supreme

¹⁶¹371 N.E.2d at 401. It is conceivable that the landlord retained a security interest in the inventory and after-acquired inventory. If this were the case, it was not a bulk sale. U.C.C. § 6-103. The transfer to the tenant may have qualified as a sale or return. U.C.C. § 2-326. In either instance, the security interest would not have been valid against the bankrupt's trustee in bankruptcy, unless the landlord had perfected by possession before bankruptcy in which case it could have been classified as a preference. Compare Bankruptcy Act § 70a with § 60, 11 U.S.C. §§ 96, 110(a) (1976). The language of the lease creating the landlord's right to the inventory was not set forth in the opinion.

¹⁶²U.C.C. §§ 6-104(1), 6-109.

¹⁶³IND. CODE § 32-2-1-7 (1976). See note 68, *supra*.

¹⁶⁴See generally W. COLLIER, 4A COLLIER ON BANKRUPTCY § 70.92 (14th ed. J. Moore, R. Oglebay, F. Kennedy & L. King 1978).

¹⁶⁵Meek v. Steele, 368 N.E.2d 257 (Ind. Ct. App. 1977). This case was brought to the court of appeals on appeal. A writ of prohibition, it seems, would also have been proper. State *ex rel.* Mammonth Dev. & Constr. Consultants, Inc. v. Superior Ct., 357 N.E.2d 732 (Ind. 1976).

¹⁶⁶Indianapolis Mach. Co. v. Curd, 247 Ind. 657, 221 N.E.2d 340 (1966). See also IND. R. TR. P. 65(B)(2).

¹⁶⁷Rauch v. Circle Theatre, 374 N.E.2d 546 (Ind. Ct. App. 1978). See notes 185-90 *infra* and accompanying text.

¹⁶⁸Bankruptcy Act § 17a(1), 11 U.S.C. § 35a(1) (1976).

Court to include the "penalty" imposed upon a bankrupt who fails to collect and pay over withholding taxes.¹⁶⁹ Claims for money or property obtained by "false representations" also are not discharged when contested under section 17.¹⁷⁰ *In re Blessing*¹⁷¹ held that a creditor must prove intent to defraud as one of the elements of non-dischargeability under this provision. The presumption of fraudulent intent under the old Indiana bad check law,¹⁷² which arose when a check was not paid within ten days after notice that it had been returned for insufficient funds, was inadequate to prove the necessary mens rea for denying discharge of the claim in bankruptcy. In *Blessing* the creditor had recovered a state judgment awarding him treble damages on a check which had been dishonored for insufficient funds before bankruptcy.¹⁷³ In a proceeding to establish non-dischargeability of the judgment, the bankruptcy judge found the state judgment to be res judicata on the issue of fraudulent intent. On appeal, error was found in giving a res judicata effect to the judgment which had found fraudulent intent based on state statutory presumption. In bankruptcy proceedings, fraudulent intent is a matter of federal law.¹⁷⁴ Claims for "alimony" or for support of a wife or child are excluded from discharge by section 17.¹⁷⁵ The Seventh Circuit Court of Appeals has held that an award of money to the wife as part of an order approving a property settlement or dividing marital property is "alimony" insofar as it provides for the support or maintenance of the wife.¹⁷⁶ Towards this end, if the order

¹⁶⁹United States v. Sotelo, 98 S. Ct. 1795 (1978). The court did not consider alternative grounds for reaching the same result. If this were a "penalty," the claim of the government was not provable and, therefore, was not discharged except to the extent of pecuniary loss. Compare *Sotelo* with Bankruptcy Act § 17a, 11 U.S.C. § 35(a) (1976), and 11 U.S.C. § 93(j) (1976). Failure to pay taxes withheld may have constituted "willful and malicious conversion" or misappropriation by a "fiduciary" under the provisions of § 17a(2) or (4) of the Bankruptcy Act, 11 U.S.C. § 35(a)(2), (4) (1976), which exempt the claim from dischargeability if contested within a proper period.

¹⁷⁰11 U.S.C. § 35(a)(2) (1976).

¹⁷¹442 F. Supp. 68 (S.D. Ind. 1977). *Accord*, Sanitation Recycling, Inc. v. Jay Peak Lodging Ass'n, 428 F. Supp. 1022 (D. Vt. 1977) (proof of fraudulent intent a requirement for non-dischargeability).

¹⁷²IND. CODE § 35-17-5-10 (1976) (defining crime as a deceptive practice). The new provision is *id.* § 35-43-5-5 (Supp. 1978).

¹⁷³For the statute allowing treble damages, see *id.* § 35-7-5-12 (1976). The new provision is *id.* § 34-4-30-1 (Supp. 1978).

¹⁷⁴The court held that the issue of fraudulent intent should be re-litigated in the bankruptcy court, rather than requiring the bankruptcy judge to determine the basis of the state court judgment. In other words, this case may, but does not necessarily, stand for the proposition that issues relating to dischargeability cannot be determined by res judicata principles with respect to ante-bankruptcy judgments.

¹⁷⁵Bankruptcy Act § 17a(7), 11 U.S.C. § 35a(1) (1976).

¹⁷⁶Nichols v. Hensler, 528 F.2d 304 (7th Cir. 1976) cert. denied, 434 U.S. 1086 (1978) (applying Indiana law prior to no-fault divorce statute).

reflects a balancing of a projected differential in the income of the parties, it is "alimony" only to that extent, which is a question of fact for the bankruptcy judge. *In re Woods*,¹⁷⁷ also decided in the Seventh Circuit, found that an order approving a division of property in which the husband agreed to pay marital debts without any other obligation to pay money was a division of property but was not based upon a differential in earning power, although the record showed a differential of thirty-eight dollars per week. Hence, the obligation of the husband to pay the marital debts was not "alimony" and was discharged in bankruptcy.¹⁷⁸ A similar holding was indicated in a footnote by the Indiana Court of Appeals in *Marburger v. Marburger*,¹⁷⁹ which, unlike the *Woods* case, involved an order under the new Indiana no-fault divorce statute.¹⁸⁰ *Marburger* also applied another provision of section 17 which states that debts which have not been duly scheduled in time for proof and allowance will not be discharged.¹⁸¹ The court noted in dictum that the husband's failure to schedule the wife as a creditor also failed to discharge him from paying marital debts as ordered under a property settlement.¹⁸² The court, however, overlooked two possible qualifications to this provision of section 17. One is that the provision does not apply to a creditor with notice of the bankruptcy, while the other provides that the creditor must be scheduled in time for proof and allowance of his claim. If the husband's bankruptcy was a no-asset case, both listed and unlisted creditors, including the wife, were not denied proof and allowance of claims because they were not required to file claims until assets were discovered.¹⁸³

10. *Suretyship; Miscellaneous.*—A tenant assigning his rights under a lease remains liable to the lessor as a surety with respect to

¹⁷⁷561 F.2d 27 (7th Cir. 1977) (applying Indiana law prior to no-fault divorce statute).

¹⁷⁸Accord, *Nitz v. Nitz*, 568 F.2d 148 (10th Cir. 1977) (husband's annual income exceeded that of wife by approximately \$1,000).

¹⁷⁹372 N.E.2d 1250, 1252 n.2 (Ind. Ct. App. 1978).

¹⁸⁰The new Indiana no-fault divorce statute permits an award of maintenance to the wife only when she is mentally or physically disabled. IND. CODE § 31-1-11.5-9(c) (1976). However, in distributing marital property, the court is required to consider "the earnings or earning ability of the parties." *Id.* § 31-1-11.5-11.

¹⁸¹Bankruptcy Act § 17a(3), 11 U.S.C. § 35a(3) (1976).

¹⁸²372 N.E.2d at 1252.

¹⁸³Under the new bankruptcy rules, if no assets are available for distribution, the first notice to creditors may advise them that it is unnecessary to file claims unless later notice of assets is given. BANKRUPTCY R. 203(b). If a dividend later becomes available, creditors are given additional time of not less than 60 days or the usual six-month period, whichever is later, in which to file their claims. BANKRUPTCY R. 302(e)(4). Hence, in a no-asset case a failure to schedule a creditor will not make his claim dischargeable, except possibly in a situation where he must bring a proceeding to determine dischargeability under § 17(3) of the Bankruptcy Act, 11 U.S.C. § 35(a) (1976).

covenants running with the land or those expressly assumed by the assignee.¹⁸⁴ This general principle was recognized in *Rauch v. Circle Theatre*.¹⁸⁵ There the lessor brought suit after the assignment against the assignor-tenant, a corporation in the process of dissolving and distributing its assets to shareholders. The court held that dissolution by the lessee, under the circumstances, constituted an anticipatory breach of the covenants in the lease upon which the lessee was a surety.¹⁸⁶ Since the assignee was solvent and performing the covenants of the lease, however, no damages were proved. No relief was granted to the landlord, who was left with the new tenant's obligation for covenants running with the land.¹⁸⁷ The court, through a receivership,¹⁸⁸ or other equitable machinery, should have required the dissolving surety to provide protection against the possibility of future loss.¹⁸⁹ By denying a receivership for this purpose, the court sanctioned a means by which a corporate surety may escape its contingent liabilities—dissolution. Since a form of fraudulent conveyance is involved, equity retains the power to protect the innocent creditor with a contingent claim in such a case.¹⁹⁰

¹⁸⁴Cf. *Powell v. Jones*, 50 Ind. App. 493, 98 N.E. 646 (1912) (tenant-assignor liable on the express covenant to pay rent unless landlord releases tenant from the obligation).

¹⁸⁵374 N.E.2d 546 (Ind. Ct. App. 1978).

¹⁸⁶See *Bushnell v. Kraft*, 133 Ind. App. 474, 183 N.E.2d 340 (1962) (liquidation of corporate obligor constitutes breach of an executory contract).

¹⁸⁷The case did not make clear whether the assignee of the tenant assumed the covenants of the lease by contract. If not, the assignee would not have been liable for covenants which did not run with the land. See also *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E.2d 199 (1952).

¹⁸⁸The landlord petitioned for a receiver which was denied, but the court on appeal in upholding the decision below stated that a receiver would have been proper. "The other remedies available to Lessors—the right to file an action for damages and petition for the appointment of a receiver under IC 1971, 34-1-2-1 (Burns Code Ed.) to preserve and collect the corporate assets—were sufficient to protect Lessor's interest." 374 N.E.2d at 553.

¹⁸⁹E.g., *Specialty Furniture Co. v. Rusche*, 212 Ind. 184, 6 N.E.2d 959 (1937) (appointment of receiver for voluntarily dissolving corporation held proper). The Probate Code protects a creditor holding a contingent obligation of the decedent. IND. CODE §§ 29-1-14-7, 29-1-14-8 (1976) (imposing liability upon devisees and heirs to the extent of the value of the property received on distribution). It seems that this procedure also applies to receivership proceedings for a dissolving corporation. IND. TR. R. 66(D) (probate procedures adopted in receivership proceedings with respect to claims). Remedies against a dissolving corporation, its officers, and shareholders are preserved for two years in case of voluntary dissolution. IND. CODE § 23-1-7-1 (1976).

¹⁹⁰Traditionally, a fraudulent conveyance by a surety will not be set aside when the principal is solvent. *Boyd v. Vickrey*, 138 Ind. 276, 37 N.E. 972 (1894). However, equity may enjoin a transfer when a debtor is threatening to dispose of his assets at a time when the creditor's action is not due. *McCormick v. Hartley*, 107 Ind. 248, 6 N.E. 357 (1886). See also *McKain v. Rigsby*, 250 Ind. 438, 237 N.E.2d 99 (1968). A lessor whose claim is one for future rent not yet due may set aside a fraudulent conveyance. *Wright v. Haley*, 208 Ind. 46, 194 N.E. 637 (1935) (bulk sale by tenant).

As a general rule, a creditor who releases or impairs collateral furnished by the principal debtor will discharge a surety to the extent of the value of the security.¹⁹¹ In addition, a binding agreement between the creditor and debtor extending the time of performance will discharge a surety who has not assented to the arrangement.¹⁹² These principles have evolved in order to protect the surety against risks of subsequent dealings between the debtor and creditor in which the surety did not take part and which tend to prejudice performance by the debtor. A surety upon a public construction contract for the benefit of subcontractors claimed that he was discharged by an application of both these rules in *American States Insurance Co. v. Staub., Inc.*¹⁹³ There the municipality had retained funds which were owed to the prime contractor. Under an Indiana statute,¹⁹⁴ a lien could be placed upon this fund by persons to whom the prime contractor was indebted on the contract as long as a claim was made within sixty days after the last work or material was furnished by the claimant. When the unpaid subcontractor failed to file his claim to this fund within the time limit, the surety asserted that it was released to the extent that the fund would have satisfied the unpaid bill. The court rejected this argument on the basis that the subcontractor had not impaired the collateral by failing to file.¹⁹⁵ The court applied the general rule that a surety is not discharged by mere passiveness of the creditor who owes no duty to take affirmative action to sue.¹⁹⁶ The same holds true when the creditor fails to

¹⁹¹This rule often is applied to situations where an owner-creditor is required by his contract with the principal-contractor to keep a retainage from work progress payments. A surety is discharged to the extent that the retainage is paid to the principal. *Weik v. Pugh*, 92 Ind. 382 (1884); *State ex rel. Hartford Accident & Indem. Co. v. Martin*, 94 Ind. App. 531, 159 N.E. 21 (1927). If the surety's promise is conditioned upon the retainage, he will be totally discharged if it is paid to the principal. *State ex rel. National Sur. Co. v. Board of Comm'r's*, 93 Ind. App. 435, 153 N.E. 421 (1926); *Hubbard v. Reilly*, 51 Ind. App. 19, 98 N.E. 886 (1912).

¹⁹²The rule here is based on the idea that the surety did not bargain for the extension and, therefore, should not be bound. *Post v. Losey*, 111 Ind. 74, 12 N.E. 121 (1887) (extension to principal granted by creditor after principal discharged in bankruptcy—surety discharged). Under the Uniform Commercial Code, an extension of time to the principal will discharge the surety only if he has a right of recourse against the principal. U.C.C. § 3-606(1)(a).

¹⁹³370 N.E.2d 989 (Ind. 1977).

¹⁹⁴IND. CODE § 5-16-5-1 (1976). If a materialman or subcontractor fails to file his claim within 60 days after his last performance, he loses his right to the fund. *MacDonald v. Calumet Supply Co.*, 210 Ind. 536, 19 N.E.2d 567, modified, 21 N.E.2d 400 (1939) (contractor completing performance for surety took fund to the exclusion of subcontractors who did not file within the statutory time).

¹⁹⁵See also *Board of Educ. v. Pacific Nat'l Fire Ins. Co.*, 19 Ill. App. 2d 290, 153 N.E.2d 498 (1958).

¹⁹⁶370 N.E.2d at 992.

preserve other rights against the debtor.¹⁹⁷ A release of the retainage after the time for filing a claim to it had lapsed was held not to prejudice the rights of the subcontractor or the surety.¹⁹⁸ The surety also claimed that it was discharged by the subcontractor-creditor's acceptance of a promissory note from the prime contractor which, apparently, extended the time for payment. Under the Uniform Commercial Code, this action presumptively operated as an extension of time.¹⁹⁹ Although the court needlessly emphasized that the note was not accepted in payment of the underlying debt, the decision clarified some old case law²⁰⁰ by holding that since the time of payment to a subcontractor or materialman on a construction contract is uncertain and continuing in nature, the extension of time was authorized by the undertaking of the prime contractor and the contract of the surety.²⁰¹ Therefore, the extension did not discharge the surety.

Other recent decisions have recognized the rule that a creditor who releases several co-sureties will discharge the others to the ex-

¹⁹⁷Under this principle, a creditor is not required to take affirmative action to sue the principal to foreclose collateral, to pay taxes, etc. Barnes v. Mowry, 129 Ind. 568, 28 N.E. 535 (1891); Wasson v. Hodshire, 108 Ind. 26, 8 N.E. 621 (1886); Hogshead v. Williams, 55 Ind. 145 (1876). Old law held that he was not under a duty to perfect a mortgage or security furnished by the debtor. Philbrooks v. McEwen, 29 Ind. 347 (1868). However, a creditor in possession of collateral or one who possesses the means for perfecting the mortgage or security interest may have a duty to do so. White v. Household Fin. Corp., 158 Ind. App. 394, 302 N.E.2d 828 (1973) (criticizing *Philbrooks*).

¹⁹⁸370 N.E.2d at 994.

¹⁹⁹"Unless otherwise agreed where an instrument is taken for an underlying obligation . . . the obligation is suspended pro tanto until the instrument is due . . ." U.C.C. § 3-802(1)(b) (applicable to a note where a bank is not the maker).

²⁰⁰Under U.C.C. § 3-802 (see note 181 *supra*) the taking of a note for a prior debt which advances the time of payment is presumed to be conditional payment, not payment. But notwithstanding that there is no presumption of payment, the taking of the note is presumed to bind the creditor to the extension. Pre-Code cases in Indiana sometimes created the inference that, if the note was not taken in "payment," the note did not operate as an agreement to extend the time of payment. Hughes v. Adams, 187 Ind. 165, 118 N.E. 680 (1918) (note taken by beneficiary of surety bond). Parol evidence is admissible under the Code and under prior law to rebut the presumption that the extension note was accepted. See Beck v. O'Dell, 193 Ind. 386, 140 N.E. 527 (1923). The presumption of extension may be rebutted by proof that the new note was taken as security upon the understanding that all rights under the original obligation should remain intact. See also Kelley v. York, 183 Ind. 628, 109 N.E. 772 (1915). Unlikely as it may be, parol proof will be allowed to show that the note is taken in payment as a full accord and satisfaction, in which event the surety on the prior obligation will be discharged.

²⁰¹A creditor extending time to a principal upon a continuing contract of guaranty does not discharge a surety who undertakes to pay the successive obligations of the principal. Morgan v. Smith Am. Organ Co., 73 Ind. 179 (1880); National Exch. Bank v. Gay, 57 Conn. 224, 17 A. 555 (1889).

tent of their right of contribution from the sureties released.²⁰² Parol evidence was admitted to establish that two of four co-makers on a promissory note were sureties or accommodation makers who were not discharged by a tender of the principal sum and interest when the debtors failed to include in the tender attorney's fees required by the note. Tender was made after suit had been filed by the holder of the note.²⁰³ A promisee entitled to attorney's fees by agreement is not entitled to enforce the provision in litigation when he fails to win an affirmative judgment.²⁰⁴

XVI. Taxation

*John W. Boyd**

A. Case Law Developments

During this year's survey period, the Indiana courts reported nine noteworthy decisions in the area of state taxation. Two of those nine cases were decided by the Indiana Supreme Court.

1. *Property and Excise Taxes.—a. Ad Valorem Taxes, Commerce Clause Exemption.*—The Indiana Supreme Court considered the exemption to the personal property tax for property in interstate commerce¹ in *State Board of Tax Commissioners v. Carrier*

²⁰²Carvey v. Indiana Nat'l Bank, 374 N.E.2d 1173 (Ind. Ct. App. 1978).

²⁰³Stockwell v. Bloomfield State Bank, 367 N.E.2d 42 (Ind. Ct. App. 1977).

²⁰⁴Rauch v. Circle Theatre, 374 N.E.2d 546 (Ind. Ct. App. 1978).

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¹Act of Mar. 18, 1975, Pub. L. No. 47, §§ 29-30, 1975 Ind. Acts 317 (current version at IND. CODE 6-1.1-10-30 (1976)), provided that personal property of nonresidents of the state who are able to show by adequate records that such personal property has been shipped into this state and placed in the original package in a public warehouse for the purpose of transshipment to an out-of-state destination, shall not, while so in the original package in such warehouse, be subject to the tax imposed by IND. CODE §§ 6-1-20 to 39 (1971) and that portion of a premises owned or leased by a consignor or consignee, shall be deemed to be a public warehouse.

Personal property of nonresidents of the state shipped into this state and placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state or within-the-state destination and so designated on the original bill of lading, or personal property of residents or nonresidents of the state placed in the original package in a public or private warehouse for the purpose of transshipment to an out-of-state destination and so designated on the original bill of lading, shall not, while so in the original package in such warehouse, be subject to tax imposed by this act. In construing this section, goods, wares and merchandise shall be exempt only to the extent that they are exempt from ad valorem taxes under the commerce clause of the Constitution of the United States. *Id.*

*Corp.*² One of Carrier's subsidiaries manufactured products in Indiana for Carrier upon a forecast and need basis, so that upon manufacture there were no specific buyers for the individual units. After manufacture, the goods were boxed and delivered by common carrier to an independent warehouse in Indianapolis. The goods so delivered were covered by a bill of lading which stated: "The merchandise covered hereby is placed in its original package in a public warehouse for purpose of transshipment to an out-of-state destination."³ The ultimate destination for the goods was determined by Carrier's shipping department in Syracuse, New York. According to the facts, approximately ninety-five percent of the goods were eventually shipped out of Indiana.

Although Carrier had been allowed exemptions under the same circumstances in 1969 and 1970, the State Board of Tax Commissioners (Board) disallowed the exemption for tax year 1971 pursuant to its expanded Regulation 16.⁴ The expanded regulation allows the goods to qualify for the exemption only if the bill of lading covering the goods shows the items' actual and ultimate destination.

The majority of the court stated that to uphold the Board's interpretation of the statutory exemption would require the court to find the legislature, in enacting the exemption for property in warehouse for interstate transshipment, intended for the taxpayer to have an exemption only when an exemption would be constitutionally mandated by the Commerce Clause of the United States Constitution.⁵ In rejecting this argument, the court said, "This interpretation would make the statute nothing more than a restatement of the rights of the taxpayer under the Commerce Clause of the United States Constitution. The statute would therefore serve no purpose."⁶

Instead the supreme court placed primary reliance on the doctrine of legislative acquiescence⁷ established in *Whirlpool Corp. v. State Board of Tax Commissioners*.⁸ *Whirlpool*, a case reviewed in a previous Survey,⁹ was based upon facts similar to those in *Carrier*. In both *Whirlpool* and *Carrier*, the taxpayers relied on the statute and claimed the exemption without being questioned by the Board. In *Whirlpool*, after allowing the exemption for at least three years,

²365 N.E.2d 1385 (Ind. 1977), rehearing denied, 368 N.E.2d 1153 (Ind. 1978).

³365 N.E.2d at 1386.

⁴IND. ADMIN. R. & REGS. §§ 6-1.1-3-9 to 32 (Burns 1976).

⁵365 N.E.2d at 1386.

⁶*Id.*

⁷*Id.* at 1387.

⁸338 N.E.2d 501 (Ind. Ct. App. 1975).

⁹Allington, *Taxation, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 340, 358-59 (1976).

the Board challenged the taxpayer's claim under a then-new amendment to the statute; but, after a series of meetings and hearings, ruled that Whirlpool was entitled to the exemption. Nonetheless, three years later, the Board again challenged Whirlpool's claimed exemption with the appropriate township assessor and notified the legislature must be deemed to have acquiesced in the exemption as applied and found such deemed acquiescence binding and controlling.

In *Carrier*, the supreme court somewhat broadened this doctrine of legislative acquiescence by ruling that privity to an administrative ruling is not a prerequisite for the invocation of the doctrine.¹⁰ The court noted further that factual foundation for use of the doctrine was present notwithstanding the lack of privity because Carrier was allowed to use the exemption in 1969 and 1970 with the Board's acquiescence.¹¹ It was not until 1971, when the Board issued the more restrictive regulation challenged in *Carrier*, that a more than literal compliance with the statute providing the exemption was required of Carrier. The court stated: "[I]t is clear that the legislature intended to provide for exemption under the facts stated in this case."¹²

The court's concluding comments in *Carrier* were to the effect that the exemption covers only what the state *could* constitutionally tax in the area of ad valorem taxation and not in any other possible area of taxation.¹³ Considering this rejection based on constitutional grounds in tandem with the court's rejection of the statute's construction as a restatement of federal constitutional principles, the only meaning which could be assigned to the last sentence of the exemption statute was one enunciating the provision as a limitation on the statute's applicability. This ruling and dicta, therefore, cast doubt on the currency of much of the court of appeals decision in *State Board of Tax Commissioners v. Philco-Ford Corp.*,¹⁴ discussed in last year's Survey.¹⁵

b. *Exemptions, Industrial Waste Control Facilities.*—The statutory procedure for determining the allowability of a property tax exemption for industrial waste control facilities¹⁶ was upheld by

¹⁰365 N.E.2d at 1387.

¹¹*Id.*

¹²*Id.*

¹³*Id.* at 1388.

¹⁴356 N.E.2d 1379 (Ind. Ct. App. 1976).

¹⁵Boyd, *Taxation, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 292, 300-01 (1977).

¹⁶Act of Mar. 18, 1975, Pub. L. No. 47, § 4, 1975 Ind. Acts 466 (repealing IND. CODE §§ 6-1-8-1 to 4 (1971)). Current law on industrial waste control facilities is codified at IND. CODE §§ 6-1.1-10-9 to 11 (1976).

the court of appeals in *Levy Co. v. State Board of Tax Commissioners*.¹⁷ That procedure called for the Indiana Stream Pollution Control Board to review and certify a taxpayer's claim for exemption.¹⁸ The pollution Board was to determine whether property qualifies for the statutory exemption after the taxpayer filed for the exemption with the appropriate township assessor and notified the pollution Board of the claim. The statute required the assessor to follow the pollution Board's determination in allowing or denying the claim for exemption. As noted in *Levy*: "The statute . . . delegates the technical determination to the expertise of the Stream Pollution Control Board."¹⁹

In *Levy*, the attack on the statute was based on the argument that, if the tax Board could not review and reverse a pollution board's determination, the statute would amount to an unconstitutional delegation of the state taxing authority to the pollution Board.²⁰ The argument was "[s]ince the Legislature delegated to the tax board the administrative duties of construing the tax laws of the State and seeing that all assessments of property are made according to law, the tax Board must also have the power to make an independent decision as to whether certain property satisfies the definition of an industrial waste control facility."²¹ The court made short shrift of this argument, finding that the delegation of taxing duties to the tax board did not preclude the legislature from delegating a specific factual determination to an agency which possessed the technical expertise necessary for making such specific factual determination.²²

The validity of the Indiana Aircraft Excise Tax Act of 1975, Indiana Code section 6-6-6.5-1 to 22²³ was upheld over multi-pronged state and federal constitutional challenges by the Indiana Supreme Court in *Indiana Aeronautics Commission v. Ambassadair, Inc.*²⁴ This tax removes the property tax burden from aircraft and imposes an excise tax on aircraft based upon the age, maximum landing weight, and classification. In *Ambassadair*, the burden imposed by the excise tax, on airplanes owned by the two travel clubs, was nearly twice what it would have been had the property tax been applicable. The challenge to the tax structure was based upon article

¹⁷365 N.E.2d 796 (Ind. Ct. App. 1977).

¹⁸IND. CODE § 6-1-8-3 (repealed 1975).

¹⁹365 N.E.2d at 800.

²⁰*Id.* at 801.

²¹*Id.*

²²*Id.*

²³IND. CODE §§ 6-6-6.5-1 to 22 (Supp. 1978).

²⁴368 N.E.2d 1340 (Ind. 1977), cert. denied sub nom., Four Winds, Inc., v. Indiana Aeronautics Comm'n, 98 S. Ct. 2235 (1978).

4, section 23 of Indiana Constitution (Equal Privileges) and the Equal Protection and Due Process Clauses of the fourteenth amendment to the United States Constitution.

In relating the equal protection and due process issues to state taxation, the court said those constitutional concepts: (1) Impose no specific limitation on the power of the states to make classifications for tax purposes other than to prohibit arbitrary classifications, (2) require the maintenance of no particular scheme of property or excise taxes, and (3) impose no particular classification requirements.²⁵ The court noted that the state constitutional requirement of equality in property taxation²⁶ was not mandated by federal equal protection.²⁷

In view of the principal that equal protection neither condemns nor approves specific criteria for tax classifications in the abstract but, rather, must be measured in context, the court found that the aircraft excise tax "is not invalid as a denial of equal protection simply because it utilizes the criteria of age and maximum landing weight, or simply because it may not utilize value, as none of these three criteria are required or rejected, *per se*."²⁸ Instead, the court proceeded to analyze the tax scheme as it applied and proffered the legislative objectives for the act: to raise revenues to support airports and governmental services rendered to operational aircraft and to distribute the resulting tax burden upon aircraft owners.²⁹ Distribution of the tax burden according to weight and age was found to be a reasonable means of accomplishing the legislative end.³⁰ Classifying aircraft differently from other property for purposes of taxation was, then, not offensive to the Equal Protection Clause.

The other prong of the equal protection attack was directed at two exemptions in the Aircraft Excise Tax Act. Those provisions exempted regularly scheduled airlines and granted a temporary three-year tax reduction in the case of aircraft assessed for 1974 property taxes payable in 1975.³¹ Concluding that "the great deference given to tax legislature and the classification they may employ by the Fourteenth Amendment and Article 1, Section 23 of the Indiana Constitution,"³² the court had little trouble finding justifications for the exemptions sufficient to withstand the challenge.³³

²⁵368 N.E.2d at 1343-44.

²⁶IND. CONST. art. 10, § 1.

²⁷368 N.E.2d at 1344.

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at 1345.

³¹IND. CODE §§ 6-6-6.5-9(f), -13(c) (1976) (amended §§ 6-6-6.5-9(b), -13(c) (Supp. 1978)).

³²368 N.E.2d at 1347.

³³See *id.*

In their due process challenge the travel clubs contended the excise tax was confiscatory. The court rejected this claim by indicating other statutes in which the effective tax rate per dollar value of the property taxes was significantly higher than that in issue in *Ambassadair*.³⁴

d. *Personal Property Tax.*—Relying on a factual determination made by a trial court regarding a taxpayer's intent, in *State Board of Tax Commissioners v. Farmers Cooperative Co.*,³⁵ the court of appeals found that grain intended for shipment to out-of-state buyers before the March 1 deadline but held beyond that date due to circumstances beyond the taxpayer's control was exempt from the personal property tax under the exemption for property in interstate commerce.³⁶ The court's ruling centered on the exemption as set forth in the departmental regulations.³⁷

The Board argued that, since the grain in question could have, under the terms of the contract, been shipped after March 1, the taxpayer was not entitled to the exemption as set forth in the regulation. The contention was that "intended shipment date" was equivalent to the latest date for shipment allowable within the terms of the sale contract. The word "intended" was included in the regulation, and, in giving the regulation its plain and ordinary meaning,³⁸ the court concluded that the terms of the contract do not necessarily determine the "intended shipping date" within the meaning of the regulation.³⁹ As the trial court had properly determined the "intended shipping date" was prior to the March 1 deadline, the court of appeals found the grain in question was exempt, explaining that if the Board desired to have the contract date controlling, it could have so provided in the regulation.⁴⁰

2. *Tax Procedure.*—In *F.W. Woolworth Co. v. State Board of Tax Commissioners*,⁴¹ the court of appeals confronted a situation in which the State Board of Tax Commissioners issued a defective notice of assessment, discovered its error, and then issued a corrected assessment notice after the statutory period for changes in assessments had run. The court ruled that a defective notice which obstructs or prohibits an effective appeal constitutes a denial of due process.⁴²

³⁴*Id.* at 1348.

³⁵370 N.E.2d 389 (Ind. Ct. App. 1977).

³⁶*Id.* at 391.

³⁷IND. ADMIN. R. & REGS. §§ 6-1.1-3-9 to 32 (Burns 1976).

³⁸370 N.E.2d at 391.

³⁹*Id.*

⁴⁰*Id.*

⁴¹369 N.E.2d 958 (Ind. Ct. App. 1977).

⁴²*Id.* at 961.

The first notice in *Woolworth* was issued on September 29, 1971, just before the October 1 statutory limit,⁴³ and omitted assessments of thirteen of Woolworth's Indiana stores but purported to be a final assessment for all of Woolworth's Indiana stores. The first notice stated the taxpayer had thirty days within which to institute a statutory appeal and that the Board could take no action to extend the period for appeal. The second "final" notice, issued on October 21 contained the same statement but added the previously omitted assessments. Further, the second notice stated it was for corrective purposes only and was not intended to modify the previous "final" notice. Noting that the failure of the Board to include the assessments for the thirteen omitted stores in the first notice effectively reduced the statutory period for the filing of an appeal from thirty to eight days,⁴⁴ the court held the corrected notice invalid as it prejudiced Woolworth's appeal rights.⁴⁵ To have upheld the belated assessment would have amounted to a denial of due process.⁴⁶

3. *Death Taxes.*—a. *Flower Bonds.*—The court of appeals in *Second National Bank of Richmond v. Department of State Revenue, Inheritance Tax Division*,⁴⁷ a case of first impression, ruled that the value of "Flower Bonds"⁴⁸ for purposes of Indiana inheritance tax was the price of such bonds on the open market, not their redemption value.⁴⁹ Face value of the "Flower Bonds" in the decedent's estate was \$200,000, but, at the time of the decedent's death, the bonds were worth slightly more than \$150,000 on the over-the-counter bond market. By statute, these bonds may be redeemed at face value in payment of the federal estate tax even though they are not mature.⁵⁰ The state argued that the higher face value should apply.

The *Second National Bank* court did not allow the state's position to prevail, noting the statutory basis for valuing an estate in Indiana is the fair market value of the property in the estate at the

⁴³Act of Mar. 18, 1975, Pub. L. No. 47, § 4, 1975 Ind. Acts 389 (current version at IND. CODE § 6-1.1-3-20 (1976)).

⁴⁴369 N.E.2d at 962.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷366 N.E.2d 694 (Ind. Ct. App. 1977).

⁴⁸See Treas. Reg. §§ 301.6312-1, -2 (1976). See also 1978 STAND. FED. TAX. REP. ¶ 9764 for an explanation of the use of Flower Bonds.

⁴⁹See 366 N.E.2d at 696. For federal estate tax purposes, such bonds must be valued in the gross estate at par value including interest accrued at date of death to the extent they are redeemable in payment of estate taxes, even though the bonds are not so used. Rev. Rul. 69-489, 1969-2 C.B. 172.

⁵⁰I.R.C. § 6312 (repealed 1971 with respect to obligations issued after Mar. 3, 1971).

time of death.⁵¹ Additionally, a Department of Revenue regulation sets forth the over-the-counter market price of bonds as the proper value for inclusion in an estate.⁵² The court agreed with an Illinois court's holding that if a statute specifies fair market value as the value to be used for estate valuation, the legislature was not referring to a special or limited value which a particular asset may have for a captive buyer's specific purpose (here, the Department of Treasury).⁵³ The Indiana court ruled: "The plain meaning of the words 'fair market value' must be employed when interpreting the statute."⁵⁴ Further noting that the commonly accepted definition of "fair market value" is what a willing buyer, under no compulsion to buy, would pay a willing seller, under no compulsion to sell, the *Second National Bank* court held for the taxpayer inasmuch as the federal government, in the "Flower Bonds" situation, is under a compulsion to buy.⁵⁵ The court of appeals relied on the reasoning of *Second National Bank* in reaching the same conclusion in *State v. Bower*.⁵⁶

b. *Gift in Contemplation of Death.*—Under the gift in contemplation of death statute,⁵⁷ the value of gifts made in contemplation of the transferor's death are includible in the transferor-decedent's gross estate, and gifts made within two years prior to death are presumed to have been made in contemplation of death.⁵⁸ Nonetheless, as noted in *Bower* that presumption is not conclusive, and it may be overcome by the showing of a substantial lifetime motive.⁵⁹ In *Bower*, the lifetime motive found factually sufficient by the trial court and upheld on review, was the elimination of property from the estate by gift to the decedent's nieces and nephews. The decedent had received this property from her sister's estate and she maintained it should have been given from her sister's estate directly to the nieces and nephews. The *Bower* court agreed and further buttressed its decision by acceptance of the argument that the gifts were actually made to avoid a contest of the decedent's sister's will.⁶⁰ The court said this latter fact alone could suffice as a substantial lifetime motive to overcome the statutory presumption.⁶¹

⁵¹366 N.E.2d at 695.

⁵²IND. ADMIN. R. & REGS. § 6-4-1-7 (Burns 1976).

⁵³*In re Estate of Voss*, 55 Ill. 2d 313, 303 N.E.2d 9 (1973). See also *In re Estate of Power*, 156 Mont. 100, 476 P.2d 506 (1970).

⁵⁴366 N.E.2d at 696.

⁵⁵*Id.*

⁵⁶372 N.E.2d 1227, 1229 (Ind. Ct. App. 1978).

⁵⁷IND. CODE § 6-4.1-2-4 (1976).

⁵⁸*Id.*

⁵⁹372 N.E.2d at 1228-29.

⁶⁰*Id.*

⁶¹*Id.*

4. *Gross Income Tax.*—The court of appeals, in *Indiana Department of State Revenue v. William A. Pope Co.*,⁶² found that a 1955 amendment to the definition of "selling at retail"⁶³ clearly evidenced a legislative intent to make retail transactions having both sales and service aspects severable for gross income tax purposes.⁶⁴ The severability factor is significant because income received from "selling at retail" is subject to gross income tax at a rate of one-half percent, while income received from the rendering of services is taxed at a two-percent rate.⁶⁵ The court also ruled that the meaning of the term "delivery" did not include installation.⁶⁶ Delivery is complete when the goods sold reach their destination; any installation work done thereafter is the performance of services and is subject to the higher tax rate.

5. *Sales Tax.*—In *Department of Revenue v. Mumma Brothers Drilling Co.*,⁶⁷ the court of appeals reversed a trial court determination that certain pump and drilling equipment sold by the taxpayer to a person engaged in a farming operation was exempt from the state sales tax under one of the exemptions found in Indiana Code section 6-2-1-39(b). The two particular exemptions argued to be applicable covered (1) sales to persons occupationally engaged in farming of "feed . . . , seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be directly used in the direct production of food and commodities"⁶⁸ and (2) "[s]ales of manufacturing machinery, tools, and equipment to be directly used . . . in the direct . . . extraction . . . of tangible personal property."⁶⁹

The court noted that the drilling and pump equipment was clearly not within the first exemption because it was not *directly* used in the *direct* production of food. As the court stated: "[T]he pump equipment was *essential* . . . but it was not *directly* used"⁷⁰ in the production of food. The pump was only indirectly used in the production of food because it directly produced the water which in turn was directly used in the production of food.

In regard to the other claimed ground, the court opined that the taxpayer was probably entitled to a exemption because it sold equipment directly used in the direct extraction of tangible personal prop-

⁶²367 N.E.2d 47 (Ind. Ct. App. 1977).

⁶³Act of Mar. 11, 1955, ch. 263, § 1, 1955 Ind. Acts 703. That amendment is now reflected in IND. CODE § 6-2-1-1(j), (k) (Supp. 1978).

⁶⁴367 N.E.2d at 50.

⁶⁵IND. CODE § 6-2-1-37 (1976).

⁶⁶367 N.E.2d at 50.

⁶⁷364 N.E.2d 167 (Ind. Ct. App. 1977).

⁶⁸IND. CODE § 6-2-1-39(b)(1) (1976 & Supp. 1978).

⁶⁹Id. § 6-2-1-39(b)(6).

⁷⁰364 N.E.2d at 171.

erty.⁷¹ The decision of the trial court in favor of the taxpayer, however, was reversed on procedural grounds.⁷²

Mumma Brothers is also instructive on a point of Indiana tax procedure. The court noted that a timely filed petition for refund pursuant to section 6-2-1-19 is a jurisdictional condition precedent to the bringing of a refund suit in an Indiana trial court.⁷³ For one of the years in question, the taxpayer in *Mumma Brothers* had not filed a petition for refund within the three-year period set forth in the statute and was, therefore, barred as a matter of subject matter jurisdiction from testing its claim in court.

B. Legislative Developments

Several bills of greater or lesser note to Indiana tax law were enacted by the 1978 General Assembly. This Survey Article will endeavor to give a brief sketch of the scope of those bills and the changes they have made in Title 6 of the Indiana Code.

The General Assembly enacted special bills under the Local Tax article of Title 6 pertaining to the promotion of convention and tourism in counties having population of between 88,000 and 108,000⁷⁴ and pertaining to the development of convention and visitor industries in counties with populations ranging from 107,000 to 113,000.⁷⁵ Practitioners in affected counties should be alert to these statutes which create new bureaucracies and levy innkeepers' taxes.

1. *Income Taxation.—a. Gross Income Tax.*—The general definition of gross income⁷⁶ has been amended to exclude from its sweep "the amounts received by a corporation or by a division of a corporation owned, operated, or controlled by its member electric cooperatives for electrical energy to be resold to their member-owner consumers."⁷⁷

Further, an exemption from gross income taxation has been extended to include the gross receipts from transportation charges, or

⁷¹*Id.* at 172.

⁷²The trial court granted summary judgment for the taxpayer. IND. R. TR. P. 56. The appellate court felt genuine issues of material fact remained in regard to the number of transactions and amount of money involved, notwithstanding the fact that, it was "clear" certain of the transactions were exempt. The case was remanded for the purpose of making the necessary fact-finding. 364 N.E.2d at 172.

⁷³*Id.* at 170 (quoting *Marhoefer Packing Co. v. Indiana Dep't of State Revenue*, 157 Ind. App. 505, 519-20, 524-25, 301 N.E.2d 209, 216, 218-19 (1973)).

⁷⁴IND. CODE §§ 6-9-6-1 to 8 (Supp. 1978).

⁷⁵*Id.* §§ 6-9-7-1 to 8.

⁷⁶*Id.* § 6-2-1-1(m).

⁷⁷*Id.*

other charges, directly related to the interstate transportation of the property from which the receipts were derived.⁷⁸

Taxpayers may now deduct from their gross income amounts paid for the return of empty returnable containers.⁷⁹

b. *Adjusted Gross Income Tax.*—Under a 1978 amendment to the definition of adjusted gross income, individual taxpayers may now subtract from their baseline figure of adjusted gross income, as determined pursuant to section 62 of the Internal Revenue Code, any amounts of supplemental railroad retirement annuities⁸⁰ which were included by the taxpayer in federal gross income, and which were not already deducted as being exempt from taxation by reason of the United States Constitution or federal statutes.⁸¹

Two new legislative provisions allow tax relief to the state's "senior citizens." First, taxpayers over age 65 may subtract \$1,000 from their baseline adjusted gross income in order to arrive at their Indiana adjusted gross income.⁸² This \$1,000 subtraction is available for each "senior citizen" exemption available to the taxpayer under section 151(c) of the Internal Revenue Code⁸³ and is in addition to the standard \$1,000 subtraction provided to each taxpayer.⁸⁴ Formerly, senior citizens were allowed a \$500 subtraction for the Indiana adjusted gross income computation.⁸⁵

Second, a credit provision was added to the adjusted gross income tax law which provides tax relief to low- and middle-income senior citizens.⁸⁶ This twenty-five dollar credit against adjusted gross income tax liability is available to individuals age 65 or over who have resided in Indiana for at least six months of the relevant taxable year and whose "household federal adjusted gross income" for the taxpayer and his spouse, if they live together, is less than \$15,000 for that year. It is important to realize that the credit is also available in the form of a refund for taxpayers having insufficient tax liability against which to apply the credit or having no tax liability whatsoever. The legislature noted that the new credit "is intended to provide relief to the individual for the state gross retail sales and use taxes that he pays on his utilities."⁸⁷

⁷⁸*Id.* § 6-2-1-7(q).

⁷⁹*Id.* § 6-2-1-6(b).

⁸⁰See 45 U.S.C. § 231 (Supp. V 1975).

⁸¹IND. CODE § 6-3-1-3.5(a)(8) (Supp. 1978).

⁸²*Id.* § 6-3-1-3.5(a)(4).

⁸³*Id.*

⁸⁴*Id.* § 6-3-1-3.5(a)(3).

⁸⁵*Id.* § 6-3-1-3.5(a)(4).

⁸⁶*Id.* § 6-3-3-8.

⁸⁷*Id.* § 6-3-3-8(b). The term "household federal adjusted gross income" means the total adjusted gross income, pursuant to section 62 of the Internal Revenue Code, of the taxpayer and his spouse, if they live together, for the relevant taxable year.

Another credit against adjusted gross income tax for charitable contributions to colleges and universities has been increased to \$100 for individual taxpayers and \$200 for joint taxpayers. Corporate taxpayers may now have a credit of up to ten percent of their adjusted gross income, or \$1,000, whichever is less.⁸⁸ Both credits are on the basis of one dollar of credit for each two dollars of contribution.

The legislature also enacted an energy-conservation related adjusted gross income tax deduction for tax years beginning after December 31, 1978. The deduction is for amounts up to \$1,000 expended by resident individual taxpayers who install new insulation, weather stripping, double pane windows, storm windows, or storm doors in their residences.⁸⁹ The deduction is only available for installations made on parts of residences constructed at least three years before the taxable year for which the deduction is claimed.⁹⁰

2. *Sales and Use Taxes.*—The provisions of the state gross retail sales tax act,⁹¹ as they apply to the sale of petroleum in Indiana, have been amended,⁹² and a new section has been added to the Indiana Code clearly setting forth the manner in which these sales are covered by the act.⁹³

The "transactions included" section of the act⁹⁴ was further amended in its "public utilities furnishing energy" subsection to provide that a corporation producing power exclusively for the use of one or more public utilities and which is owned or controlled by a public utility shall be considered a retail merchant and subject to tax except on sales to other public utilities or to owned or controlled corporations producing power exclusively for the use of such utilities.⁹⁵ Transactions constituting sales to corporations which produce power exclusively for the use of public utilities and which are owned or controlled by such utilities are extended sales tax exemptions by an amendment to the exemption statute.⁹⁶

The legislature also extended sales tax exemptions to include sales of equipment or devices used to administer insulin,⁹⁷ necessities for colostomy or ileostomy, and medical equipment, supplies, or devices used in conjunction with the aforementioned articles.⁹⁸

⁸⁸IND. CODE § 6-3-3-5 (1976 & Supp. 1978).

⁸⁹*Id.* § 6-3-2-5 (Supp. 1978).

⁹⁰*Id.* § 6-3-2-5(b).

⁹¹*Id.* §§ 6-2-1-37 to 53 (1976).

⁹²See *id.* § 6-2-1-38(c) (Supp. 1978).

⁹³*Id.* § 6-2-1-37.5. See also *id.* §§ 6-6-1-2, -22.1 for additional new legislation relating to the taxation of fuels.

⁹⁴*Id.* § 6-2-1-38 (1976).

⁹⁵*Id.* § 6-2-1-38(c) (Supp. 1978).

⁹⁶*Id.* § 6-2-1-39(b)(16).

⁹⁷*Id.* § 6-2-1-39(b)(13).

⁹⁸*Id.* § 6-2-1-39(b)(28).

3. *Exempt Organizations.*—The tangible personal property of an exempt organization which is used by the organization in a trade or business not substantially related to the exercise or performance of the organization's exempt purpose is no longer exempt from the personal property tax.⁹⁹ Further, the income from unrelated trades or businesses of exempt organizations is no longer exempt from the gross income tax,¹⁰⁰ or the adjusted gross income tax.¹⁰¹ The definition of "unrelated trade or business" is keyed to the definition of that term in the Internal Revenue Code.¹⁰²

4. *Property and Excise Taxes.*—The 1978 legislature deferred for one year, to March 1, 1979, all counties' general reassessment of real property.¹⁰³

One provision of the personal property tax exemption extending to property in interstate commerce¹⁰⁴ has been rewritten to provide that personal property is exempt from property taxation if: (1) The property has been placed in the original package in a public or private warehouse for transshipment to an out-of-state destination as evidenced by an original bill of lading covering the goods, (2) the property remains in the original package in such a warehouse, and (3) the property had been ordered and is ready for shipment in interstate commerce to a specific known destination to which the property is subsequently shipped.¹⁰⁵ If the property is not shipped to that destination, the taxpayer claiming the exemption must file an amended return.¹⁰⁶

The reworked exemption statute also provides that personal property is exempt from property taxation if the property: (1) Is placed in the original package in a public warehouse, (2) was transported to that warehouse by common carrier, (3) is held in the warehouse for transshipment to an out-of-state destination and is so labeled, and (4) remains in the warehouse in the original package.¹⁰⁷

Both of those exemptions, as well as a similar one for nonresidents,¹⁰⁸ are subject to the limitation discussed in connection with *Carrier*.¹⁰⁹ That limitation stipulates application "only to the extent the property is exempt from taxation under the commerce clause of the Constitution of the United States."¹¹⁰

⁹⁹*Id.* § 6-1.1-10-36.5.

¹⁰⁰*Id.* § 6-2-1-7.5.

¹⁰¹*Id.* § 6-3-2-3.1.

¹⁰²I.R.C. § 513.

¹⁰³IND. CODE § 6-1.1-4-4 (Supp. 1978).

¹⁰⁴*Id.* § 6-1.1-10-30.

¹⁰⁵*Id.* § 6-1.1-10-30(b).

¹⁰⁶*Id.*

¹⁰⁷*Id.* § 6-1.1-10-30(c).

¹⁰⁸*Id.* § 6-1.1-10-30(a).

¹⁰⁹For a discussion of this case, see notes 1-15 *supra* and accompanying text.

¹¹⁰IND. CODE § 6-1.1-10-30(d) (Supp. 1978).

A new personal property tax exemption was extended to property held in a foreign trade zone established under federal law¹¹¹ which was either imported into the foreign trade zone from a foreign country or placed in that zone exclusively for export to a foreign country.¹¹² The statute further provides the foreign trade zone exemption applies only to the extent required by the commerce clause of the United States Constitution. Taxpayers claiming foreign trade zone exemptions are required to include the true cash value of the exempt property on their personal property tax return.¹¹³

Tangible personal property owned by an Indiana not-for-profit corporations and used by that corporation in a residential health facility or Christian Science home or sanitorium is exempt from property taxation.¹¹⁴

The \$1,000 deduction from assessed value of residential real property belonging to certain low-income senior citizen property owners¹¹⁵ has been broadened in scope. Formerly, the deduction applied only to such taxpayers whose gross income, combined with that of his spouse, did not exceed \$6,000 and the assessed value of the property did not exceed \$6,500. Those figures, under the 1978 amendment, are now \$10,000 and \$9,000, respectively. A new provision also extends the deduction to a surviving spouse of a senior citizen, who is more than sixty years old and has not remarried.¹¹⁶

Other related property actions by the 1978 legislature include: (1) Extension of real property tax relief to surviving spouses of veterans¹¹⁷ and to World War I veterans,¹¹⁸ (2) increase of the penalty for unpaid property taxes from eight percent of the deficiency to ten percent of the deficiency,¹¹⁹ (3) amendment of the Motor Vehicle Excise Tax to exclude vehicles owned or leased and operated by an institution of higher learning from the definition of "vehicles" covered by the act,¹²⁰ and (4) amendment of the Saving and Loan Association Tax¹²¹ and establishment of a new rate schedule.¹²²

¹¹¹See 19 U.S.C. § 81 (1978).

¹¹²IND. CODE § 6-1.1-10-30.5 (Supp. 1978).

¹¹³*Id.* § 6-1.1-10-31.

¹¹⁴*Id.* § 6-1.1-10-18.5.

¹¹⁵*Id.* § 6-1.1-12-9.

¹¹⁶*Id.* § 6-1.1-12-9(d).

¹¹⁷*Id.* § 6-1.1-12-16.

¹¹⁸*Id.* § 6-1.1-12-17.4.

¹¹⁹*Id.* § 6-1.1-37-10.

¹²⁰*Id.* § 6-6-5-1(a)(5).

¹²¹*Id.* § 6-5-8-5.

¹²²*Id.* § 6-5-8-5.1.

XVII. Workmen's Compensation

Gary P. Price*

A. Arising Out of and in the Course of Employment

1. *Accident.*—The major development in workmen's compensation law during the survey period occurred by accident, or rather, by a resolution of what exactly is meant by "accident" within the meaning of the Indiana Workmen's Compensation Act.¹ The historical framework in which the conflicting views of "accident" evolved is best reflected in the case of *Inland Steel Co. v. Almodovar*.² The facts in *Almodovar* showed that the claimant had been pulling on an air hose during the course of his employment, one of his usual and ordinary tasks, when his back suddenly "gave way." In addition, medical testimony showed that the claimant had experienced prior medical problems with his back. The result of this event was an award of temporary total disability and a further finding of permanent partial impairment by the Industrial Board of Indiana.

On appeal the employer challenged, *inter alia*, that aspect of the Board's decision classifying Almodovar's injuries as an accident arising out of, and in the course of, the employment. The majority opinion affirmed the decision of the Board³ and, in so doing, distinguished *United States Steel Corp. v. Dykes*,⁴ a supreme court decision which had long been cited for proposition that some unexpected or untoward incident, distinct from the employee's normal routine, is a necessary prerequisite to a compensable accident. The language normally cited states: "The mere showing that he was performing his usual routine everyday task when he suffered a heart attack does not establish a right to workmen's compensation because there was no event or happening beyond the mere employment itself."⁵

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¹IND. CODE §§ 22-3-2-1 to 21 (1976 & Supp. 1978). *Id.* § 22-3-2-2 (Supp. 1978) provides, in part, as follows:

[E]very employer and every employee, except as herein stated, shall be required to comply with the provisions of this law, respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby.

²361 N.E.2d 181 (Ind. Ct. App.) *transfer denied*, 366 N.E.2d 169 (Ind. 1977).

³*Id.* at 188.

⁴238 Ind. 599, 154 N.E.2d 111 (1958), distinguished in *Inland Steel Co. v. Almodovar*, 361 N.E.2d at 184.

⁵238 Ind. at 613, 154 N.E.2d at 119.

In *Almodovar*, however the court of appeals went beyond the bare holding of *Dykes* and noted that the supreme court, after reviewing cases cited in a treatise on the subject,⁶ concluded: "In each of the above instances the fatal heart attack was preceded by some type of untoward or unexpected incident, or there was evidence of the aggravation of a previously deteriorated heart or blood vessel."⁷ The court of appeals focused on the disjunctive nature of the quoted language⁸ and reasoned that "accident" could very well encompass an unexpected aggravation of a pre-existing condition, as well as the traditional notion of injury arising from an unexpected event.⁹

In a strongly worded dissent, Judge Buchanan expressed disfavor with the conclusion of the majority, stating that "accident" in workmen's compensation law had been "elasticized to the breaking point."¹⁰ Judge Buchanan capsulized his view of the concept of accident by stating: "'Accident' as a word of art in Workmen's Compensation law has become as mysterious as the Loch Ness monster . . . and awaits the attention of the Supreme Court or the Legislature."¹¹

Nevertheless, despite Judge Buchanan's invitation to engage in a fishing expedition, the supreme court refused to disturb the majority opinion in *Almodovar*. The supreme court denied transfer of *Almodovar*, notwithstanding a dissent which indicated agreement with Judge Buchanan's conclusion that the *Almodovar* opinion contravened *Dykes*.¹²

In short order, the "Loch Ness monster" of workmen's compensation law reared its ugly head again, this time in a decision emanating from the court of appeals. In *Ellis v. Hubbell Metals, Inc.*,¹³ the facts raised issues identical to those of *Almodovar*. Ellis, while engaged in his normal work tasks, had received a sudden back injury. Again, the evidence showed that Ellis had suffered from a pre-existing back ailment, which had been aggravated by normal work tasks. In *Ellis*, however, the Board did not find that an accident, within the meaning of the Workmen's Compensation Act, had occurred, and, in fact, did not treat the issue in its decision. The

⁶B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 6.20 (1950), reviewed in *United States Steel v. Dykes*, 238 Ind. at 613, 154 N.E.2d at 119.

⁷238 Ind. at 613, 154 N.E.2d at 119 (emphasis added), noted in *Inland Steel Co. v. Almodovar*, 361 N.E.2d at 184.

⁸361 N.E.2d at 184.

⁹*Id.*

¹⁰*Id.* at 189 (Buchanan, J., dissenting).

¹¹*Id.* See also *Rivera v. Simmons Co.*, 329 N.E.2d 39, 42 (Ind. Ct. App. 1975).

¹²366 N.E.2d 169 (Ind. 1977) (Pivarnick, J., dissenting).

¹³366 N.E.2d 207 (Ind. Ct. App. 1977).

court of appeals reversed the decision of the Board, holding that Ellis had suffered an "accidental aggravation" of a pre-existing injury.¹⁴

The reasoning which led to the court's conclusion began with the traditional definition of "accident" in the workmen's compensation area as some "mishap or untoward event not expected or designed."¹⁵ The court then noted that the gist of the problem with the concept of accident devolved from the fact that two theories were utilized in judicial decisions: (1) The *unexpected cause* theory, which requires some unusual or extraordinary causal element as a prerequisite to an accident; and (2) the *unexpected result* theory, which requires only that the injury itself occur unexpectedly in the normal course of employment activities.¹⁶ After setting forth those competing theories, the court of appeals expressly adopted the unexpected result theory, holding that theory "is more in keeping with the humanitarian purposes that underlie the Workmen's Compensation Act, which the courts are required to liberally construe in favor of the worker."¹⁷

This adoption of the unexpected result theory of the causal aspect of accident now places Indiana in the solid majority of jurisdictions accepting the more liberal interpretation of the term "accident."¹⁸ At the time of this writing, the unexpected result theory appears to be solidly entrenched in recent decisions.¹⁹ By this point in the evolution of the meaning of "accident," one would hope that the Loch Ness monster has been finally laid to rest, and that the term "accident" has been transformed into a concept readily understandable by all involved. The *Ellis* decision is a forward-looking, well-reasoned opinion in the workmen's compensation law area and should be well received by both the bench and bar.

2. *Aggravation to Injury.*—In a case of first impression, the Indiana Court of Appeals held, in *McDaniel v. Sage*,²⁰ that an employee who seeks medical care on the work premises for a

¹⁴*Id.* at 211.

¹⁵*Id.* at 210 n.3 (citing Haskell & Barker Co. v. Brown, 67 Ind. App. 178, 117 N.E. 555 (1917)).

¹⁶366 N.E.2d at 212. See 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 37-38 (1978).

¹⁷366 N.E.2d at 212.

¹⁸See 1B A. LARSON, *supra* note 16, § 38.

¹⁹See, e.g., Calhoun v. Hillenbrand Indus., Inc., 374 N.E.2d 54 (Ind. Ct. App. 1978) (citing and relying on *Ellis v. Hubbell Metals, Inc.*, 366 N.E.2d 207 (Ind. Ct. App. 1977)). But see *Martinez v. Taylor Forge & Pipe Works*, 368 N.E.2d 1168 (Ind. Ct. App. 1977) (unexpected result theory would not allow compensation for gradual hearing loss because there was no evidence that the loss of hearing was of a sudden, or reasonably brief, character).

²⁰366 N.E.2d 202 (Ind. Ct. App. 1977).

medical problem not job-related, and sustains further injury as a result, suffers an injury "arising out of and in the course of" his employment and is relegated to the provisions of the Workmen's Compensation Act as his sole and exclusive remedy.²¹

The facts in *McDaniel* disclosed that the appellant had experienced weakness and light-headedness that was not work-related. Appellant then sought care from his employer's medical staff, and, in the course of that treatment, was subjected to an injection that was administered in an allegedly negligent manner, thereby causing further injury. Although accepting the general rule that new or aggravated injury of a job related injury also "arises out of and in the course of" employment, appellant argued that the non-job-related origin of his precipitating illness was sufficient to remove him from coverage of the Act.

In rejecting this contention, the court of appeals relied on alternative theories to support a finding of coverage under the Act. First, the court analogized appellant's activity to a temporary departure from work, undertaken for the purpose of comfort or convenience to the employer.²² The court reasoned that the relevant considerations were not the cause or facts of the original injury, but rather were the circumstances which caused the aggravation (visit to employer's health care facility). The question then becomes whether those circumstances are of the sort which could reasonably be expected to arise in the course of employment. The *McDaniel* court answered that question affirmatively.²³ On an alternative theory, the court simply held that when an employee seeks medical care from a physician located on the company's premises, such activity is so incidental to employment as to dictate the conclusion that a resultant injury will be deemed to have arisen out of his employment, notwithstanding the non-work-related origin of the illness or injury that precipitated the aggravating event.²⁴

B. Horseplay.

Horseplay is the doctrine of workmen's compensation law which precludes compensation for those injuries which arise "in moments of diversion from work" when men play pranks on each other.²⁵ The rationale for non-compensation is that such incidents are common knowledge and constitute a risk of employment assumed by the

²¹*Id.* at 205.

²²*Id.* at 204-05 (citing B. SMALL, *supra* note 6, § 7.5).

²³366 N.E.2d at 205.

²⁴*Id.* (citing 127 A.L.R. 1108 (1940)).

²⁵Chicago I. & L. Ry. v. Clendennin, 81 Ind. App. 323, 143 N.E. 303 (1924).

employee. Or, as a pragmatist may put it, boys will be boys, and the workmen's compensation system should not be required to compensate for injuries received as a result of non-work-related frolicking.

The two major exceptions to this rule are that, first, an innocent victim of horseplay will not be denied compensation,²⁶ and second, compensation will be allowed where an employer's knowledge of, and acquiescence in, such conduct makes horseplay a condition incident to employment.²⁷ The issue in *Pepka Spring Co. v. Jones*²⁸ was whether Jones was an innocent victim of a co-employee's horseplay so as to qualify him for compensation under the Act.

The facts disclosed that Jones had initiated "spring-throwing" at a co-employee, an activity that, apparently, would be particularly pervasive in a spring factory. After throwing a spring, Jones left his job to get a drink of water and returned directly to work-related activities. While so engaged, Jones was struck in the eye by a spring thrown by the co-employee Jones had previously pelted. The problem raised on appeal resulted from Jones' admitted participation in spring-throwing. The question of his participation *immediately* prior to the accident was, however, the subject of conflicting testimony.

The court of appeals deferred to the findings of the Board and held that there were reasonable inferences drawn by the Board, based on competent evidence, which could support a finding that Jones had returned to work and abandoned his horseplay at the time of the accident.²⁹ The dissent criticized the majority's deference to the Board under the facts of the case. The dissent emphasized that the findings of the Board indicated that Jones had thrown a spring at the co-employee, got a drink of water, returned to work for three to five minutes, and was then hit with a spring thrown by the same co-employee. According to the dissent, these findings removed all doubt as to the inducement of the co-employee's throwing a spring at Jones, and established an ongoing pattern of horseplay.³⁰ The dissent also felt these facts refuted the finding that Jones was an innocent victim.³¹

The resolution of the *Pepka Spring Co.* opinions, if one is possible, is found in the emphasis the majority gave to the facts. For the majority, the time that Jones was back to work, whether three to

²⁶See, e.g., *Woodlawn Cemetery Ass'n v. Graham*, 149 Ind. App. 431, 273 N.E.2d 546 (1971); *In re Loper*, 64 Ind. App. 571, 116 N.E. 324 (1917). See generally B. SMALL, *supra* note 6, § 6.9.

²⁷See authorities cited in note 26 *supra*.

²⁸371 N.E.2d 389 (Ind. Ct. App. 1978).

²⁹*Id.* at 390.

³⁰*Id.* at 393 (White, J., dissenting).

³¹*Id.*

five minutes or three to five hours, was immaterial, so long as there could exist a reasonable inference that Jones had withdrawn from the horseplay. The dissent, on the other hand, appeared to conclude that the relatively short period of time between the "first throw" and the "return throw" *ipso facto* precluded a finding that Jones had withdrawn from horseplay. On the whole, the de-emphasis of the temporal aspect of horseplay situations by the majority appears to be the better approach, at least insofar as it encourages *recovery* compensation to the employee injured on the job site (for whatever reason).

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8. KNOWN BONDHOLDERS, MORTGAGEES, AND OTHER SECURITY HOLDERS OWNING OR HOLDING 1 PERCENT OR MORE OF TOTAL AMOUNT OF BONDS, MORTGAGES OR OTHER SECURITIES (If there are none, so state)			
NAME <u>none</u>		ADDRESS	
9. FOR COMPLETION BY NONPROFIT ORGANIZATIONS AUTHORIZED TO MAIL AT SPECIAL RATES (Section 132.122, PSM) The purpose, function, and nonprofit status of this organization and the exempt status for Federal income tax purposes (Check one)			
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11. I certify that the statements made by me above are correct and complete.		SIGNATURE AND TITLE OF EDITOR, PUBLISHER, BUSINESS MANAGER, OR OWNER  <u>Daniel Abel, Managing Editor</u>	
12. FOR COMPLETION BY PUBLISHERS MAILING AT THE REGULAR RATES (Section 132.121, Postal Service Manual)			
<p>39 U. S. C. 3626 provides in pertinent part: "No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates."</p> <p>In accordance with the provisions of this statute, I hereby request permission to mail the publication named in Item 1 at the phased postage rates presently authorized by 39 U. S. C. 3626.</p>			
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